

The Napoleonic *Code pénal* and the Codification of Criminal Law in Spain

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I – Criminal Law Reform and Codification: A Break with the Past?

“... [A] rule in which nothing was worthy of respect, or conservation: no part could be saved for the ordering of future society. All of it, entirely all, needed to be left behind (...) The cart of destruction and reform had to pass through the ruined building, because in it there was scarcely an arch, scarcely a column, that could nor should be saved ... In Spanish criminal law there was only one legitimate and viable system, the system of codification, the system of absolute change.¹

I remember how surprised I got the first time I read that paragraph some years ago. I thought this could be hardly true. Even more: I was almost convinced that its author did not say what he really thought about the true role of the criminal law tradition in the codification enterprise. I am not saying he lied. I am just saying he did not show the whole picture, for it emphasized just a side of the “criminal problem² in the late 18th century – beginning of the 19th century.³

The problem of the criminal law at that time is very well known, but it is not uncommon to overlook an aspect which explains many other features of the criminal law before it was codified. I am referring to – or what it seems to me to be – a relevant fact, namely, that the main problem of the criminal law before its codification was not scientific but political. This factor explains many aspects which otherwise could not be properly grasped: that the criminal legislation was so harsh; punishments so severe, affecting even sometimes those who did not commit any crime; some punishments were still in force theoretically though not always (or hardly) applied in practice (confiscation of goods, infamy, some degrading punishments, dead penalty, etc.); the

¹ Pacheco, J.-F.: *El Código penal concordado y comentado* (1848; I use the latest edition: 2000), p. 82.

² Tarello, Giovanni: *Storia della cultura giuridica moderna*. Vol. I: *Assolutismo e codificazione del diritto*. Bologna, 1976, p. 383; for an interesting treatment of Enlightenment thought and criminal law, see p. 383-483.

³ A description of the Spanish criminal law in the 18th century can be seen in ramos vazquez, Isabel: “Las reformas borbónicas en el Derecho penal y de Policía criminal de la España dieciochesca” (see <http://www.forhistiur.de/zitat/1001ramos.htm>); a 18th-century view of that criminal-law period can be seen in Cadafalch y Burguna, Joaquín: *Discurso sobre el atraso y descuido del Derecho penal hasta el siglo XVIII* (1849); for an overview on the Codification of criminal in Spain, see Masferrer, Aniceto: *Tradición y reformismo en la Codificación penal española. Hacia el ocaso de un mito. Materiales, apuntes y reflexiones para un nuevo enfoque metodológico e historiográfico del movimiento codificador penal europeo*. Jaén, 2003; Masferrer, Aniceto: “Codification of Spanish Criminal Law in the Nineteenth Century. A Comparative Legal History Approach”, *Journal of Comparative Law* Vol. 4, no. 1 (2009), p. 96-139; Masferrer, Aniceto: “Liberal State and Criminal Law Reform in Spain”, Sellers, Mortimer & Tomaszewski, Tadeusz (Eds.), *The Rule of Law in Comparative Perspective*. Series: *Ius Gentium: Comparative Perspectives on Law and Justice*, vol. 3 (2010), p. 19-40.

lack of proportionality between the crimes and their punishments; that the torture had not been abolished yet although it was hardly applied in many territories; that the kind of punishment applied depended more on political circumstances or interest than on the legislative prescription; that judges enjoyed – and sometimes misused, although less frequently than it may be thought – such a considerable degree of discrecionalidad; etc.

Ius commune lawyers had defended the majority of the modern criminal law principles which later on would be claimed by figures like Beccaria, Montesquieu, Feuerbach, Lardizábal, among others. I am referring to the legality of crime and punishment, the proportionality between crime and punishment, the individuality of punishment, favorable decision, favorable interpretation, and the presumption of innocence.⁴

The reader may think that this is precisely what the French Revolution both demanded and brought about, and it is true. However, these criminal law principles were neither original nor new. These principles were scientifically well known although not politically recognized and implemented.⁵ A new political system was needed to keep the criminal law free from abuses which came from its use for political purposes.⁶ That was precisely the greatest contribution of the French Revolution to the modern criminal law.⁷ More specifically, both the Declaration of the Rights of

⁴ Lalinde Abadía, Jesús: *Iniciación histórica al Derecho español* (1983), p. 669; on the presumption of innocence in Enlightenment thought and its roots in glossators' doctrine, see Joachim Hruschka, "Die Unschuldsvemutung in der Rechtsphilosophie der Aufklärung", in *ZStW*, CXII (1990), Heft 2, p. 285-300.

⁵ On this matter, see Masferrer, *Tradición y reformismo en la Codificación penal española*, p. 69-91; Masferrer, "Codification of Spanish Criminal Law in the Nineteenth Century...", p. 100-111; Masferrer, "Liberal State and Criminal Law Reform in Spain", p. 23-40.

⁶ The importance of the political context in explaining and reconstructing the historical development of criminal law should not be neglected; on this matter see, Masferrer, *Tradición y reformismo en la Codificación penal española*, p. 53-54; Masferrer, "La dimensión ejemplarizante del Derecho penal municipal catalán en el marco de la tradición jurídica europea. Algunas reflexiones iushistórico-penales de carácter metodológico", *AHDE* 71 (2001), p. 439-471, particularly p. 446-450; Caenegem, R. C. Van: "Criminal Law in England and Flanders under King Henry II and Count Philip of Alsace", *Actes du Congrès de Naples (1980) de la société italienne d'Histoire du Droit. Studia Historica Gandensia* 253, 1982, p. 254: "The conclusion is that no study of criminal law, in the past or in the present, can be conducted fruitfully without constant reference to the political situation and the power structure in society: criminal law is not the fruit of logical deductions from eternal principles formulated by unworldly scholars". This is particularly important in historical periods of political reforms, convulsions or revolutions, as the French historiography has clearly shown (see the bibliography cited the footnote n. 7).

⁷ On the close link between the political revolution (French Revolution) and the codification of criminal law in France, see Carbasse, Jean-Marie: *Introduction historique au droit pénal*. Paris, 1990, p. 329 ff.; Carbasse, Jean-Marie: "Le droit pénal dans la Déclaration des droits", *Droits: Revue française de théorie juridique* VIII (1988), p. 123-134; Martinage, Renée: "Les innovations des constituants en matière de répression", *Une autre justice. Contributions à l'histoire de la justice sous la Révolution française* (dir. Robert Badinter). Fayard, 1989, p. 105-126; Carbasse, Jean-Marie: "État autoritaire et justice répressive: l'évolution de la législation pénale de 1789 au Code de 1810", *All'ombra dell'Aquila Imperiale. Transformazioni e continuità istituzionali nei territori sabaudi in età napoleonica (1802-1814)*. *Atti del convegno, Torino 15-18 ottobre 1990*, Roma, 1994, I, p. 313-333; Lascoumes, Pierre: "Révolution ou réforme juridique? Les codes pénaux français de 1791 à 1810", *Revolutions et justice en Europe. Modeles français et traditions nationales (1780-1830)*. L'Harmattan, 1999, p. 61-69; Schnapper, Bernard: "Les Systemes repressifs français de 1789 à 1815", *Revolutions et*

the Man and of the Citizen (1789) and the first modern French Constitution (1791) brought with it a remarkable legacy which I have called the “constitutionalization” of the main criminal law principles, followed by their “legalization”, whereby these principles were laid down in the criminal codes or – to distinguish them from the “absolutist” ones – the “liberal” codes.⁸

justice en Europe. Modeles français et traditions nationales (1780-1830). L'Harmattan, 1999, p. 17-35; Lascoumes, Pierre/ Poncela, Pierrette: “Classer et punir autrement: les incriminations sous l'Ancien Régime et sous la Constituante”, *Une autre justice. Contributions à l'histoire de la justice sous la Révolution française* (dir. Robert Badinter). Fayard, 1989, p. 73-104; Leca, Antoine: “Les principes de la revolution dans les droits civil et criminel”, *Les principes de 1789*. Marseille, 1989, p. 113-149; Levasseur, Georges: “Les grands principes de la Déclaration des droits de l'homme et le droit répressif français”, *La Déclaration des droits de l'homme et du citoyen de 1789, ses origines – sa pérennité*. Paris, 1990, p. 233-250; Martinage, Renée: “Les origines de la pénologie dans le code pénal de 1791”, *La revolution et l'ordre juridique privé. Rationalité ou scandale? Actes du colloque d'Orléans (11-13 septembre 1986)*, Orléans, 1988, I, p. 15-29; Martinage, Renée: *Punir le crime. La repression judiciaire depuis le code pénal*. Villeneuve-d'Ascq, 1989; Sicard, Germain: “Sur la terreur judiciaire a Toulouse (1793-AN II)”, *Liber Amicorum. Etudes offertes à Pierre Jaubert*. Bourdeaux, 1992, p. 679-700; Delmas Saint-Hilaire, Jean-Pierre: “1789: un nouveau droit pénal est né...”, *Liber Amicorum. Etudes offertes à Pierre Jaubert*. Bourdeaux, 1992, p. 161-177.

⁸ Caroni, Pio: *Lecciones catalanas sobre la historia de la Codificación*. Madrid, 1996, p. 69 ff.; see also Masferrer, “Codification of Spanish Criminal Law in the Nineteenth Century...”, cited in the footnote n. 3; Masferrer, “Liberal State and Criminal Law Reform in Spain”, cited in the footnote n. 3; on the codification movement in the Early Modern Age, see Cartuyvels, Yves: *D'où vient le code pénal?: une approche généalogique des premiers codes pénaux absolutistes au XVIII^e siècle*, [Montréal et al.]: Presses de l'Université de Montréal/Presses de l'Université d'Ottawa/De Boeck Université, 1996; Cartuyvels, Yves: “Le droit penal entre consolidation etatique et codification absolutiste au XVIII^e siecle”, *Le penal dans tous ses Etats. Justice, Etats et Sociétés en Europe (XII^e-XX^e siècles)*. Bruxelles, 1997, p. 252-278; salmonowicz, Stanislaw: “Penal codes of the 16th-19th centuries. A discussion of models”, *La codification européenne du Moyen-Age au siècle des Lumières. Etudes réunies par Stanislaw Salmonowicz*. Warsawa, 1997, p. 127-141; Sojka-Zielinska, Katarzyna: “Über den modernen Kodifikationsbegriff”, *La codification européenne du Moyen-Age au siècle des Lumières. Etudes réunies par Stanislaw Salmonowicz*. Warsawa, 1997, p. 9-19; Castan, Yves: “Les codifications penales d'Ancien Régime”, *Le penal dans ses Etats. Justice, Etats et Sociétés en Europe (XII^e-XX^e siècles)*. Bruxelles, 1997, p. 279-286; Garnot, Benoît: “L'évolution recente de l'Histoire de la criminalité en France à l'époque moderne”, *Histoire de la Justice* 11 (1998), p. 225-243; Garnot, Benoît: “Justice, infrajustice, parajustice et extrajustice dans la France d'Ancien Régime”, *Crime, Histoire et Sociétés* 2000, vol. 4, n. 1, p. 103-120.

The aforementioned principles can be found in the articles 4-8 of the Declaration of the Rights of the Man and of the Citizen,⁹ being the last two particularly relevant to criminal justice:

Art. 7: “No person shall be accused, arrested, or imprisoned except in the cases and according to the forms prescribed by law. Any one soliciting, transmitting, executing, or causing to be executed, any arbitrary order shall be punished. But any citizen summoned or arrested in virtue of the law shall submit without delay, as resistance constitutes an offense”.

Art. 8: “The law shall provide for such punishments only as are strictly and obviously necessary, and no one shall suffer punishment except it be legally inflicted in virtue of a law passed and promulgated before the commission of the offense”.

This was, most probably, the greatest contribution of France and – more particularly – the French Revolution to the modern criminal law system.¹⁰ Moreover, France constituted the first Continental country which “constitutionalized” the criminal law principles which had been claimed by *ius-commune* lawyers some centuries before the French Revolution.

Going back to Pacheco’s statement, it could be said that he may be right in asserting that the criminal law needed a complete break, an absolute rupture. However, it was not a scientific rupture, but a political one, that which occurred in France in the context of the Revolution: that shift from the Old Regime to the Liberal system is what permitted the emergence of a new criminal law system whose main principles were “constitutionalized” because there was a political will which did not exist in the context of the 18th-century Absolutist monarchies. The same process would go through all the other Continental countries, including Spain.

From the political point of view, thus, the criminal law system experienced a clear break or rupture which can be seen in the different European constitutions, some articles of which established the principles of the new criminal law justice.¹¹

From the scientific point of view, on the contrary, both “continuity” and “reform” are the expressions which better describe the development of the criminal law from the 18th century to the 19th century. This explains why modern criminal law codes, adopting the “constitutionalized” criminal law principles, contained many criminal law notions, categories and institutions which stemmed from the tradition. In this regard, I have to say that codification, in my view, was not – as Pacheco maintained –

⁹ Art. 4 DRMC 1789: “Liberty consists in the freedom to do everything which injures no one else; hence the exercise of the natural rights of each man has no limits except those which assure to the other members of the society the enjoyment of the same rights. These limits can only be determined by law”. Art. 5 DRMC 1789: “Law can only prohibit such actions as are hurtful to society. Nothing may be prevented which is not forbidden by law, and no one may be forced to do anything not provided for by law”. Art. 6 DRMC 1789: “Law is the expression of the general will. Every citizen has a right to participate personally, or through his representative, in its foundation. It must be the same for all, whether it protects or punishes. All citizens, being equal in the eyes of the law, are equally eligible to all dignities and to all public positions and occupations, according to their abilities, and without distinction except that of their virtues and talents”.

¹⁰ On this matter, see the bibliography cited in the footnote n. 7.

¹¹ For the Spanish and German constitutionalism, see Masferrer, Aniceto: “El alcance de la prohibición de las penas inhumanas y degradantes en el constitucionalismo español y europeo. Una contribución histórico-comparada al contenido penal del constitucionalismo español y alemán”, *Presente y futuro de la Constitución española de 1978*. Valencia 2005, p. 515-544.

“the system of absolute change”.¹²

It is true that the *Code pénal* was not the first European criminal code. Several criminal law statutes and codes had been enacted in the 18th-century Europe: the Bavarian Code of 1751 (Joseph III),¹³ the Austrian criminal ordinance of 1768 (Marie Therese),¹⁴ the Code of Catherine II (never in force), the Tuscan Code of 1786 (Leopold II),¹⁵ the Austrian criminal Code of 1787 (Joseph II),¹⁶ the French Code of 1791 (General Assembly),¹⁷ and the Prussian *Allgemeines Landrecht* of 1794 (Frederick William II),¹⁸ among others.¹⁹ Although some of them were more humanitarian or enlightened than others,²⁰ all of them – except the French one – were drafted in similar political contexts, being enacted by Monarchs, not by parliaments. This led some scholars to distinguish between “enlightened codes” and “Liberal codes”.²¹ And it may somehow explain the kind of – “political”, I would say – “absolute change” Pacheco was talking about.

This does not mean to deny any positive contribution of the codification movement to the criminal law development. That contribution could be synthesized in three expressions: systematization, humanization and secularization. In other words, the whole codification could be summarized by saying that the criminal law underwent

¹² See the footnote n. 1.

¹³ *Codex Iuris Bavarici Criminalis de anno MDCCLI* (München, 1751).

¹⁴ *Constitutio Criminalis Theresiana oder der Römisch-Kaiserl. zu Hungarn und Böhheim etc. König. Apost. Majestät Maria Theresia Erzherzogin zu Oesterreich etc. Peinliche Gerichtsordnung vom 31. Dezember 1768* (Wien, 1769).

¹⁵ *Riforma della legislazione criminale Toscana del di 30 novembre 1786* (Siena, 1786); there is a French version: *Nouveau Code criminel pour le Grand-Duché de Toscane* (Lausanne, 1787).

¹⁶ *Allgemeines Gesetz über Verbrechen und derselben Bestrafung vom 13. Januar 1787* (Wien, 1787). A German-Polish version was also edited (Wien, 1787).

¹⁷ *Code pénal des 25 septembre – 6 octobre 1791*, in *Collection des lois, décrets, ordonnances, réglemens et avis du Conseil d’Etat, publiée sur les éditions officielles...* par J.B. Duvergier, t. III; it was also edited in H. Remy, *Les principes généraux du code penal de 1791* (Paris, 1910), p. 242 ff.

¹⁸ *Allgemeines Landrecht für die Preussischen Staten vom 5. Februar 1794*, Bd. I-IV (Berlin, 1794); it has also been edited as *Allgemeines Landrecht für die Preußischen Staaten von 1794*. Mit einer Einführung von Dr. Hans Hattenhauer und einer Bibliographie von Dr. Günther Bernert. 2. Auflage. Neuwied-Kriftel-Berlin, 1994; see also Burschmann, Arno: *Textbuch zur Strafrechtsgeschichte der Neuzeit. Die klassischen Gesetze*. München, 1998, p. 272 ss.; the German historiography has considerably criticized this code, considering it as a “dinosaur of the criminal law” (Volk, Klaus: “Napoleon und das deutsche Strafrecht”, *JuS* 1991, p. 282).

¹⁹ Following the Austrian criminal Code of 1787 (Joseph II), other codes were enacted by François II at the end of the 18th century – beginning of the 19th century, namely, the criminal Code of 1796 (*Stradgesetzbuch für Westgalizien vom 17. Junius 1796*, in *Gesetz und Verfassungen im Justizfache, Justizgesetzsammlung –JGS–*, Praghe, 1796); and the *Strafgesetz über Verbrechen und schwere Polizei-Übertretungen vom 3. September 1803* (JGS, Wien, 1816, n. 626, p. 313 ff.).

²⁰ In this regard, it is clear than the Code of 1786 and the Austrian criminal Code of 1787 were much more influence by the Enlightenment thought and the enlightened humanitarianism than the Bavarian Code of 1751 and the Austrian criminal ordinance of 1768; on this matter, see Pauli, Leslau: *Peines corporelles et capitales dans la législation des États européens des années 1751-1903* (Warsawa-Krakow, 1986), p. 10-15; Ancel, Marc: “The Collection of European Penal Codes and the Study of comparative Law”, (1957-1958) 106 *U. Pa. L. Rev.* 329, p. 344-345.

²¹ See the footnote n. 8.

a gradual and clear process of systematization, humanization and secularization.²² Thus the influence of the French criminal code over the other European countries could be consistently described exploring these three great contributions of any modern code to the criminal law.

Let me emphasize the idea that the codification scheme was never generally understood as a legal tool to break with the past, although it contributed to the consolidation of political criminal law reforms which, once brought about by the liberal system, had been previously laid down in the constitutions.

A similar process occurred concerning the private law: the Napoleonic Code just laid down some liberal principles from the Revolution (property, freedom of contract, torts) which, in Gordley's view, were not rebuilt on new, individualistic principles.²³ In fact, this seems to be what Portalis, the main drafter of the French civil code, thought about his code, being fully aware of the important role of the past in drafting, interpreting and applying the code.²⁴

Going back to the codification of criminal law, the question as to whether modern codes constituted a break with the past, or just a certain degree of reform from

²² On this matter, see Masferrer, "Codification of Spanish Criminal Law in the Nineteenth Century...", p. 111-139; Masferrer, "Liberal State and Criminal Law Reform in Spain", p. 25-27.

²³ Gordley, James: "Myths of the French Civil Code", 42 *Am. J. Comp. L.* 459, 488-489 (1994): "The Code did not rebuild the law of property, contract or tort on new and individualistic principles. Indeed, it was drafted in what one can only describe as the trough between two intellectual waves: a wave of natural law theory that crested in the 16th and 17th centuries, and a wave of individualistic will-centred theory that did not emerge clearly until the 19th century. To the extent the drafters were guided by general principles at all, they used those of the natural lawyers which were already old-fashioned. The principles of the Revolution that did influence the drafters were a republican vision of law and the principle of human equality. The republican vision, however, was rejected by the drafters themselves, and the principle of equality did not lead to a reshaping of private law. Although the Code is often said to have abolished feudal property, it is hard to find much of economic consequence that changed".

²⁴ Portalis, *Preliminary Address delivered on the occasion of the presentation of the draft of the government commission*, on 1 Pluviôse IX (21 January 1801): "But what a great task is the drafting of a civil legislation for a great people! The endeavor would be beyond human powers, if it entailed giving this people an entirely new institution and if, forgetting that civil legislation ranks first among civilized nations, one did not deign to benefit from the experience of the past and from that tradition of good sense, rules and maxims which has come down to us and informs the spirit of centuries. (...) The lawmaker does not exert an authority so much as a sacred function. He must not lose sight of the fact that laws are made for men, and not men for laws; that (...), rather than change laws, it is almost always more useful to present the citizenry with new reasons to love them; that history offers us the promulgation of no more than two or three good laws over the span of several centuries (...). It is useful to protect all that need not be destroyed: laws must show consideration for common practices, when such practices are not vices. Too often one reasons as though the human race ended and began at every moment, with no sort of communication between one generation and that which replaces it. Generations, in succeeding one another, mingle, intertwine and merge. A law-maker would be isolating his institutions from all that can naturalize them on earth if he did not carefully observe the natural relationships that always, to varying degrees, bind the present to the past and the future to the present; and that cause a people, unless it is exterminated or falls into a decline worse than annihilation, to always resemble itself to some degree. We have, in our modern times, loved change and reform too much; if, when it comes to institutions and laws, centuries of ignorance have been the arena of abuses, then centuries of philosophy and knowledge have all too often been the arena of excesses".

the historical point of view, has been extensively explored in France,²⁵ Germany²⁶ and Spain.²⁷ In analyzing this matter the historiography of Germany has devoted considerable efforts in tackling the influence of the Napoleonic code over the German codification of criminal law. The fact that part of Germany belonged to France, being hence the French law in force in some German territories (through a law enacted on the 9th March 1801),²⁸ explains – at least, partly – the interest of the German historiography in the French influence.²⁹

²⁵ On this matter, see Masferrer, Aniceto: “Continuismo, reformismo y ruptura en la Codificación penal francesa. Contribución al estudio de una controversia historiográfica actual de alcance europeo”, *AHDE* 73 (2003), p. 403-420; see also Rousseaux, X. / Dupont-Bouchat, M.-S.: “Revolutions et justice penale. Modeles français et traditions nationales (1780-1830)”, *Revolutions et justice en Europe. Modeles français et traditions nationales (1780-1830)*. L’Harmattan, 1999, p. 9-15.

²⁶ On the discussion about continuity and reform in the nineteenth century Germany, see Härter, Karl: “Kontinuität und Reform der Straffjustiz zwischen Reichsverfassung und Rheinbund”, *Reich oder Nation? Mitteleuropa 1780-1815* (herausgegeben von Heinz Duchhardt und Andreas Kunz). *Veröffentlichungen des Instituts für Europäische Geschichte Mainz*, Abteilung Universalgeschichte, Beiheft 46, Mainz 1998, p. 219-278; Ludi, Regula: *Die Fabrikation des Verbrechens. Zur Geschichte der modernen Kriminalpolitik 1750-1850* (Frühneuzeit-Forschungen 5), Tübingen, bibliotheca academica, 1999 (a review of this research can be found in Härter, Karl: “Von der “Entstehung des öffentlichen Strafrechts” zur “Fabrikation des Verbrechens”. Neuere Forschungen zur Entwicklung von Kriminalität und Straffjustiz im frühneuzeitlichen Europa”, *Rechtsgeschichte. Zeitschrift des Max-Planck-Institut für europäische Rechtsgeschichte* 1 (2002), p. 159-196); more recently, Härter, Karl: “Reichsrecht und Reichsverfassung in der Auflösungsphase des Heiligen Römischen Reichs deutscher Nation: Funktionsfähigkeit, Desintegration und Transfer”, *Zeitschrift für Neue Rechtsgeschichte* 28 (2006), Nr. 3/4, p. 316-337.

²⁷ Masferrer, *Tradición y reformismo en la Codificación penal española*, cited in the footnote n. 3.

²⁸ Schulze, R.: “Rheinisches Recht im Wandel der Forschungsperspektiven”, *ZNR* (2002), p. 65-90, particularly p. 67; Feherenbach, Elisabeth: *Traditionale Gesellschaft und revolutionäres Recht: Die Einführung des Code Napoléon in den Rheinbundestaaten*. Göttingen, 3 edic., 1983; Kleinbreuer, Stefan: *Das Rheinische Strafbuch. Das materielle Strafrecht und sein Einfluß auf die Strafgesetzgebung in Preußen und im Norddeutschen Bund*. Bonn, 1999; regarding both the private law and the procedural private law, see also Schubert, Werner: *Französisches Recht in Deutschland zu Beginn des 19. Jahrhunderts. Zivilrecht, Gerichtsverfassungsrecht und Zivilprozeßrecht*. Köln, 1977.

²⁹ On this matter, see Von Kräwel: “Über die französischen Elemente im Preußischen Strafbuch”, *Archiv für Preussisches Strafrecht*, Berlin I (1853), p. 461 ss.; Hartmann, Fritz: *Der Einfluß des französischen Rechts auf das Preussische Strafbuch von 1851 (Allgemeiner Teil)*. Göttingen, 1923; Volk, Klaus: “Napoleon und das deutsche Strafrecht”, *JuS* 1991, p. 281 ss.; Zieschang, Frank: *Das Sanktionensystem in der Reform des französischen Strafrechts im Vergleich mit dem deutschen Strafrecht*. Berlin, 1992; Schubert, Werner: *Der Code pénal des Königreichs Westphalen von 1813 mit dem Code pénal von 1810 im Original und in deutscher Übersetzung*. Frankfurt/Main, Peter Lang, 2001; Brandt, Christian: *Die Entstehung des Code pénal von 1810 und sein Einfluß auf die Strafgesetzgebung der deutschen Partikularstaaten des 19. Jahrhunderts am Beispiel Bayerns und Preußens*. Frankfurt/Main, Peter Lang, 2002; on the codification of criminal law in Germany, see Sellert, Wolfgang: “Strafrecht und Strafrechtsgeschichte im 18. und 19. Jahrhundert in Deutschland”, *Rechtsgeschichtliche Abhandlungen. Publikationen des Lehrstuhls für Ungarische Rechtsgeschichte an der Eötvös-Loránd-Universität*, Redakteur Barno Mezey, Band 21, Budapest, 1997, p. 131-139; Engelbrecht, Jörg: “The French Model and German Society: the Impact of the Code Penal on the Rhineland”, *Revolutions et justice en Europe. Modeles français et traditions nationales (1780-1830)*. L’Harmattan, 1999, p. 101-107; see also Masferrer, “Continuismo, reformismo y

Some efforts have also been made concerning the territories of Belgium,³⁰ Italy³¹ and England,³² among others.³³

II – The Influence of the *Code pénal* over the Spanish Codification

A – The Impact of the French Revolution: The “Constitutionalization” of some criminal-law principles

The Spanish case cannot be compared with those of other European jurisdictions. Singular historical circumstances of Spain, concerning its relation with France, make the Spanish case peculiar. As it is very well known, Spain fought against France for seven years (1808-1814), period in which the *Cortes* (representative body or parliament) of Cádiz adopted many reforms and principles coming from the liberal system. In the criminal law field, several 1812 Constitution provisions laid down the new criminal law principles: principle of legality;³⁴ principle of individuality of

ruptura en la Codificación penal francesa...”, cited in the footnote n. 25.

³⁰ Stevens, Fred: “La codification penale en Belgique. Heritage français et débats neerlandais (1781-1867)”, *Le penal dans tous ses Etats. Justice, Etats et Sociétés en Europe (XII^e-XX^e siècles)*. Bruxelles, 1997, p. 287-302.

³¹ Da Passano, Mario: “La codification du droit pénal dans l’Italie jacobine et napoléonienne”, *Revolutions et justice en Europe. Modeles français et traditions nationales (1780-1830)*. L’Harmattan, 1999, p. 85-99.

³² Emsley, Clive: “Law Reform and Penal Reform in England in the Age of the French Revolution”, *Revolutions et justice en Europe. Modeles français et traditions nationales (1780-1830)*. L’Harmattan, 1999, p. 319-331.

³³ See the bibliography already cited in the footnote n. 25; on the influences received by the French codification, see Godechot, Jacques: “Les influences étrangères sur le droit pénal de la Révolution française”, *La révolution et l’ordre juridique privé. Rationalité ou scandale? Actes du colloque d’Orléans (11-13 septembre 1986)*, Orléans, 1988, I, p. 47-53.

³⁴ The 1812 Constitution: was the only one that did not incorporate this principle explicitly, but can be inferred from the interpretation of some provisions. In other Spanish Constitutions: art. 9, 1837 Constitution: “No Spaniard can be tried or sentenced except by a judge and a Court having jurisdiction under previous laws and [for a] crime in the manner prescribed by law”; art. 9, 1845 Constitution: “No Spaniard can be tried or sentenced except by a judge and a competent court, pursuant to law prior to the crime and in the manner prescribed by law”; art. 10, 1856 Constitution (never promulgated): “No Spaniard can be tried or sentenced except by a judge and jurisdiction, pursuant to law prior to the crime and in the manner prescribed by law”; art. 11, 1869 Constitution: “No Spaniard may be tried or sentenced except by a judge and a court with knowledge and competence in the manner prescribed by law, pursuant to law prior to the crime. Extraordinary courts may not create special commissions to hear any crime”; art. 16, 1876 Constitution: “No Spaniard can be tried or sentenced except by a judge and a competent court, pursuant to law prior to the crime and in the manner prescribed by law”; art. 28, 1931 Constitution: “Only deeds determined prior to their commission are punishable by law. No one shall be tried except by a competent court and in accordance with legal procedures”; 1978 Constitution: “The Constitution guarantees the rule of law ...” (art. 3); “No one can be convicted or sentenced for actions or omissions which when committed did not constitute a crime, misdemeanor or administrative offense under the laws then in force”. (art. 25.1); on the this matter, see Masferrer, *Tradicón y reformismo en la Codificación penal española*, p. 75-76; Masferrer, “Codification of Spanish Criminal Law in the Nineteenth Century...”, p. 103-104; Masferrer, “Liberal State and Criminal Law Reform in Spain”, p. 28-31; for a more specific and exhaustive view, see Mirow, Matthew C.: “The Legality Principle and the Constitution of Cádiz”, *Judges’ Arbitrium to the Legality Principle: Legislation as a Source of Law in Criminal*

punishments,³⁵ encompassing the abolition of the infamy punishment for the offspring of the convicted for treason³⁶ and the confiscation of goods;³⁷ and the principle of due process.³⁸ All these constitutional principles were called to shape the main lines of the modern criminal law system which the codes would depart from. This may be considered the first influence of the French model over the Spanish modern or liberal criminal law justice, namely, the close relationship between the liberal revolution, the “constitutionalization” of the modern criminal law principles, and their “legalization” through codes: whereas the *Code pénal* contained the criminal law principles laid down in the *Declaration of the Rights of the Man and of the Citizen* (1789) and the 1791 Constitution, in Spain the 19th-century codes would also follow in the footsteps of the Spanish constitutions (1812, 1837, 1845, 1869, 1876).

In fact, this occurred in all the European countries, not just in Spain. From this perspective, this may seem not very peculiar to Spain, since this “constitutionalization” of the modern criminal law principles and their “legalization” through codes can be seen even in common law jurisdictions.³⁹

Trials (Anthony Musson / Georges Martyn / Heikki Pihlajamäki, eds.), Duncker & Humblot, 2012 (forthcoming, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1844486).

³⁵ Art. 305, 1812 Constitution: No penalty imposed for any crime whatever shall have no effect on the family of the convicted, but shall have its full effect on precisely he who deserves it.

³⁶ Masferrer, Aniceto: *La pena de infamia en el Derecho histórico español. Contribución al estudio de la tradición penal europea en el marco del ius commune*. Madrid, Dykinson, Madrid, 2001, p. 373 ff.; and by the same author: “La pena de infamia en la Codificación penal española”, *Ius fvgit. Revista interdisciplinar de estudios histórico-jurídicos* 7 (1998), p. 123-176.

³⁷ Art. 304 1812 Constitution: The punishment of confiscation of goods shall not be imposed. In other Spanish Constitutions: Article 10, 1837 Constitution: “There will be never imposed the penalty of confiscation of property, and no Spaniard will be deprived of his property, but for cause of public utility, subject to appropriate compensation”; art. 10, 1845 Constitution: “There will be never imposed the penalty of confiscation of property, and no Spaniard will be deprived of property except on justified grounds of public utility, subject to appropriate compensation”; art. 12, 1856 Constitution (never promulgated): “Nor shall the penalty of confiscation of property be imposed for any offense”; the 1869 Constitution did not expressly prohibit the enforcement of the penalty for the confiscation of property, although it could be implied from art. 13: “No one shall be temporarily or permanently deprived of their property and rights, or disturbed in the possession of them, except by court order. Public officials who, under any pretext violate this requirement shall be personally liable for damage caused ...”; art. 10, 1876 Constitution: “The penalty of confiscation of property will be never imposed and no one shall be deprived of his property except by competent authority and for cause of public utility, subject always appropriate compensation”, art. 44, 1931 Constitution: “the penalty of confiscation of property shall be imposed in no case”; the current 1978 Constitution does not contain any provision expressly laying down such a prohibition, in the area of taxation, not penal, art. 31.1 provides that “all contribute to sustain public expenditure according to their economic (...), which in no case shall be confiscatory in scope”. On this punishment, see Pino Abad, Miguel: *La pena de confiscación de bienes en el Derecho histórico español*. Córdoba, 1999; on the legal development of the death penalty in Spain, see also Sainz Guerra, Juan: *La evolución del Derecho penal en España*. Universidad de Jaén, 2004, p. 349-352.

³⁸ Arts. 286 ff., 1812 Constitution. In other Spanish Constitutions: arts. 7 and 63 ff., 1837 Constitution; 7 and 66 ff., 1845 Constitution; 8 and 67 ff., 1856 Constitution (never promulgated); arts. 2-4 and 12, 1869 Constitution; 4-8, 16, 17, 76; and 79, 1876 Constitution; arts. 29, 42 and 94 ff., 1931 Constitution, arts. 17.2-4, 24.2 and 117.1, 1978 Constitution.

³⁹ On this matter, see Masferrer, Aniceto: “The Principle of Legality and Codification in

B – The Influence of the Napoleonic code over the Early 19th-century Spanish codes

What could be said about the more specific influence of the Napoleonic criminal code over the codification of Spanish criminal law?

Unlike in Germany, the Spanish historiography has not paid much attention to it, frequently taking it for granted, as sometimes sources show, particularly some of the works of the commentators of the codes. As far as I know, there is no single article or book dealing with the French influence, being this paper the first attempt to shed light to this matter.

A possible way to explore the French criminal code's influence in Spain may be the analysis of the concordances published by Pacheco in 1848,⁴⁰ and Groizard y Gómez de la Serna in 1870,⁴¹ but this approach does not seem to be accurate enough because these concordances themselves do not really prove any particular influence in the drafting of the code, although they may be a useful starting point for an exhaustive comparative study, done article by article, between the French criminal code and the Spanish codes.

In my view, the two best ways to analyze the French influence in codifying the criminal law in Spain are:

1) The exploration of the materials and sources used by those who drafted the codes, as well as the discussions which such drafts generated in their process of approval in the parliament. In doing so, the codification's committees (*Comisiones de Codificación*) and the parliamentary debates (*Diario de Sesiones de las Cortes*) should be carefully analyzed.

2) The study of the works written by those who commentated the Spanish criminal codes (commentary literature, or *Comentarios a los códigos*). All Spanish criminal codes were studied and commentated, sometimes even article by article, by lawyers, experts in criminal law. The commentaries of the Codes of 1848-1850⁴² and

the 19th-century Western Criminal Law Reform", *Judges' Arbitrium to the Legality Principle: Legislation as a Source of Law in Criminal Trials* (Anthony Musson / Georges Martyn / Heikki Pihlajamäki, eds.), Duncker & Humblot, 2012 (forthcoming).

⁴⁰ Pacheco, *El Código penal concordado y comentado*, cited in the footnote n. 1; Pacheco is one of the most remarkable 19th century Criminal law scholar and the main commentator of the Spanish Criminal Codes of 1848 and 1850; on this matter, see Cuello Calón, Eugenio: "Centenario del Código de 1848: Pacheco, penalista y legislador", *Información Jurídica*. Madrid, 1948, p. 5-8; Jiménez De Asúa, Luis: "Pacheco, en el centenario del Código penal español", *El Criminalista* (Buenos Aires) 9 (1951), p. 20-22; Antón Oneca, José: "El Código penal de 1848 y D. Joaquín Francisco Pacheco", *Anuario de Derecho Penal y de las Ciencias Penales* 18 (1965), p. 473-495; Candil Jiménez, Francisco: "Observaciones sobre la intervención de D. Joaquín Francisco Pacheco en la colaboración del Código Penal de 1848", *ADPCP* 28 (1975), p. 405-441; Rodríguez Gil, M. Magdalena: "Joaquín Francisco Pacheco, un penalista en el marco constitucional", *Revista de la Facultad de derecho de la Universidad Complutense* 83 (1993-1994), p. 259-294; Sanchez Gonzales, M^a Dolores del Mar: *Los Códigos Penales de 1848 y 1850*. Madrid, 2003, p. 198-200; Pacheco also wrote his *Estudios de Derecho Penal* (lectures given at the *Ateneo* of Madrid). Madrid, 1868.

⁴¹ Groizard Y Gómez De La Serna, Alejandro: *El Código penal de 1870 concordado y comentado*. Burgos, 1870-1899 (8 vols.).

⁴² In addition to the Pacheco's *Código penal concordado y comentado*, cited in the footnote n. 40, see also Castro Orozco, José de / Ortiz De Zúñiga, Manuel: *Código penal explicado para la común inteligencia y fácil explicación de sus disposiciones*. 3 vols., Granada, Manuel Sanz, 1848; Vizmanos, Tomás María de / Álvarez Martínez, Cirilo: *Comentarios al Nuevo Código*

1870⁴³ are, among others,⁴⁴ particularly relevant.

Having said that, it should be noted that pretending explore exhaustively, here and now, the French influence over the codification of criminal law in Spain would be, besides impossible, beyond the limits of this paper. An enterprise like this would produce a book rather than a mere chapter to be published in a collective monograph.

However, let me present just a brief account of what I think I have discovered in my research on this matter. In doing so, I will distinguish three different kinds of influences, namely, 1) the idea of the code itself; 2) the formal or structural influence; and 3) the substantive influence. In addition to it, I will also use the parliamentary debates, since they are particularly revealing concerning the role which played the *Code pénal* in the law making process of the first two Spanish penal codes (1822 and 1848).

1) The idea of the code itself

The influence of the *Code pénal* of Napoleon over Spain and other European countries was due, first of all, to the fact of being the first modern criminal code in Europe. As we saw, several codes had been promulgated in Europe during the 18th century – beginning of the 19th century,⁴⁵ but the Napoleonic criminal code was the first which can be regarded as “modern”, expression which refers to the fact of being promulgated within the liberal system context, that is: a) it was approved by a parliament, not by a king; b) the recognition of the national sovereignty had replaced the absolutist monarchy; and c) the liberal principles like legality and equality had already been introduced.

The fact of being the first modern (or liberal) code of Europe located the

Penal. Madrid, Establecimiento Tipográfico de J. González y A. Vicente, 1848; D. J. S. / D. A., de B.: *Código penal de España comentado*. Barcelona, Imprenta de Tomás Gorchs, 1949; on this matter, see Sánchez González, *Los Códigos Penales de 1848 y 1850*, p. 198-203; several manuals dealt with the 1848 Criminal Code, being one of them that of Gómez de la Serna, Pedro / Montalbán, Juan Manuel: *Elementos del Derecho Penal de España*. 2 vols., Madrid, 1849; on the manuals dealing with that Code, see Sánchez González, *Los Códigos Penales de 1848 y 1850*, p. 205-208.

⁴³ In addition to the Groizard y Gómez de la Serna's *Código penal de 1870 concordado y comentado*, cited in the footnote n. 41, see also Buenaventura Selva, Narciso: *Comentarios al Código penal reformado y planteado provisionalmente por Ley de 3 de junio de 1870*. Madrid, 1870; González y Serrano, José: *Apéndice á los Comentarios del Código Penal de Don Joaquín Francisco Pacheco*. Madrid, Imprenta y Fundación de Manuel Tello, 1876; Gómez de la Serna, Pedro / Montalbán, Juan Manuel: *Elementos del Derecho Civil y Penal de España*. Madrid, Librería de Gabriel Sánchez, 1881; on the 1870 criminal Code, see also Silvela, Luis: *El Derecho penal estudiado en principios y en la legislación vigente en España*. Madrid, 2nd ed., 1903; González Miranda y Pizarro: *Historia de la Codificación penal española y ligera crítica del código vigente* (Doctoral thesis, unpublished). Madrid, 1906; Azcutia, M.: *La Ley penal. Estudios prácticos sobre la interpretación, inteligencia y aplicación del Código de 1870, en su relación con los de 1848 y 1850, con nuestras antiguas Leyes patrias y con las principales legislaciones extranjeras*. Madrid, 1876; Saldaña, Q.: *Comentarios científico-prácticos al Código penal de 1870. Infracción y responsabilidad*, vol. I, t. I, Madrid, 1920; Viada y Vilaseca, S.: *El Código penal reformado de 1870*. 3 vols., Madrid, 1894; Hidalgo y García, J. A.: *El Código penal conforme a la doctrina del Tribunal Supremo*, Madrid, 1908; Álvarez Cid, J. / Álvarez Cid, T.: *El Código penal de 1870*, Córdoba, 1908.

⁴⁴ On the Spanish criminal Code of 1928, compared to that of 1870, see Jaramillo García, A.: *Novísimo Código Penal comentado y cotejado con el de 1870*. Salamanca, Imprenta de Silvestre Ferreira, 1928; San Martín Losada, Luis: *El Código penal de 1928. Su estudio y comparación con el de 1870*. Madrid, 1928.

⁴⁵ See the footnotes n. 13 ff., and their main texts.

Napoleonic code as a reference, as a source to resort to, for any other European country which may find itself on the road to codify the criminal law. In this regard, France took advantage of being the first continental country in which the liberal revolution occurred. From then onwards, it would be hard to imagine any country codifying its criminal law without keeping an eye to the model of Napoleon. Not surprisingly the French criminal code was translated into different languages,⁴⁶ including the Spanish one.⁴⁷ Although the French codes were translated into different languages, it is worthwhile to note that the French was then the most well-known language in Europe, readable and used by many intellectuals from different European countries, as it was explicitly recognized by Conde de Toreno, a member of the Spanish Parliament in 1822.⁴⁸

This fact explains why the Napoleonic code was used as a model, cited so frequently in the concordances with other codes, and in the parliamentary debates, as well as being taken as a comparative-law reference.

This also happened somehow outside the civil law tradition, namely, in some common law jurisdictions.⁴⁹ Despite the variety of codes enacted all over Europe, it seems that the codification in France, perhaps for having been so influential,⁵⁰ has been erroneously regarded among common lawyers as the “Continental model” of codification. In drafting criminal law reports,⁵¹ it was difficult – if not impossible

⁴⁶ For Germany, see Schubert, *Der Code pénal des Königreichs Westphalen von 1813 mit dem Code pénal von 1810...*cit., p. 12-13; for English-speaking territories, there are several translations, namely, that of J. Fergus Belanger (1811); see also *The Penal Code of France, Translated into English...* London: H. Butterworth, 1819; in the 20th century, see that of Jean F. Moreau & Gerhard O.W. Mueller, *The Penal Code of France* (1960; see a review of it on <http://www.jstor.org/pss/3478667>).

⁴⁷ For Spain, see the *Código penal del imperio Francés, traducido en lengua española por el texto de la edición original y la única que [...] publicado de oficio, por el jurisconsulto Don Benito Redondo...* Paris: en la imprenta de P.-N. Rougeron, 1810; *Code pénal de l'empire français, traduit en langue espagnole sur le texte de l'édition originale et seule officielle*, par Don Benoit Redondo.

⁴⁸ (Conde de Toreno) “La situación de la Francia con respecto á este asunto es diferente de la nuestra. Su idioma es general en toda la Europa, al paso que el nuestro es muy poco usado. Si allí se escribiese un periódico en lengua española, solo circularía aquí, y poco daño podría hacer a otras potencias, pero escrito en lengua francesa circularía por toda la Europa...” (DSC, Congreso, 24 de enero de 1822, p. 1984).

⁴⁹ On this matter, I'm now finishing an article entitled “French Codification and “Codiphobia” in the Common Law Tradition”, which describes the impact of the French codification in common law jurisdictions.

⁵⁰ On this matter, see, for example, Tetley, William: “Mixed jurisdictions: common law v. civil law (codified and uncoded)”, *4 Unif. L. Rev.* 591 (1999), p. 600-601; Limpens, Jean: “Territorial Expansion of the Code”, Bernard Schwartz (ed.), *The Code Napoleon and the Common-Law World* (New York, 1956 – I use the The Lawbook Exchange edition, Union-New Jersey, 1998), 93-109; see Schwartz book's review in Dainow, Joseph: “The Civil Code and the Common Law” (1956-1967) *51 Nw. U. L. Rev.* 719; an old, Anglo-American view on the impact of the French codification can be seen in Lobinger, Charles S.: “The Napoleon Centenary's Legal Significance”, (1921) *55 Am. L. Rev.* 665.

⁵¹ For a general view on the history of criminal law in Nineteenth Century Britain, see Cornish, William Rodolf / Hart, Jenifer / Manchester, A.H. / Stevenson, J.: *Crime and Law in Nineteenth Century Britain*. Dublin, Irish University Press, 1978; Radzinowicz, Sir Leon / Hood, Roger: *A History of English Criminal Law and its Administration from 1750*. London, Stevens & Sons, 1986, vol. 5, p. 723-740; Hostettler, John: *The Politics of Criminal Law Reform in the Nineteenth Century*. Chichester, Barry Rose, 1992; Bentley, D.: *English Criminal*

– to escape from the French model,⁵² as some primary sources show.⁵³ This does not necessarily mean, however, that the French code was particularly influential or followed from the substantive point of view, even when it was cited or mentioned. In Western Australia,⁵⁴ for example, where a criminal code was enacted (1902),⁵⁵ some

Justice in the Nineteenth Century (1998); Cairns, David J.A.: *Advocacy and the Making of the Adversarial Criminal Trial 1800-1865* (Oxford, 1998).

⁵² As Hostettler shows, from the *Commissioner's First Report* (1834), it was clear that there was a will to draft a Digest, Brougham being in charge of it. Lord Wynford - not willing to follow the French code's path, since the brevity of Napoleon's code "almost put absolute power into the hands of the judges" - warned about the main difficulties of such undertaking. The notions of code and digest started to get confused, and by identifying the code with the French experience, British pride was wounded (Hostettler, *The Politics of Criminal Law Reform in the Nineteenth Century*, p. 39-40). Later, Hostettler goes on, four kinds of codification were distinguished, namely, the Bentham Code, the French Code, Partial Codes like the 1882 *Bill of Exchange Act* or the 1892 *Bill of Sale Of Goods Act*, and the Stephen Code (Hostettler, *The Politics of Criminal Law Reform in the Nineteenth Century*, p. 210-211); see also M.D. Chalmers, "An Experiment in Codification", (1886) 2 *Law Quarterly Review* 125; the French civil code was immediately translated from French into English: *Code Napoleon; or The French Civil Code*. Literally translated from the original and official edition, published at Paris, in 1804. By a Barrister of the Inner Temple. Claitor's Book Store, Baton Rouge 2, La, 1969 Reprint; the American John Rodman, a prominent member of the metropolitan bar, translated the four French codes.

⁵³ Anthony Hammond, *A Letter to the Members of the Different Circuits*. London, 1826; *The Criminal Code. Coining*. London, Printed by George Eyre and Andrew Strahan, Printers to the King's Most Excellent Majesty, 1825; Anthony Hammond noted that "this Article of the Criminal Code contains a Digest of Judicial Decisions, a Consolidation of the Enactments, the Opinions of the Texts Writers, and the Law of Scotland and of France; the former from the Commentaries of Mr. Baron Hume, the latter from the Code Napoleon (p. III), see also *The First Report from his Majesty's Commissioners on the Criminal Law, 24th June 1834* (Ordered, by The House of Commons, to be Printed, 30 July 1834) contained as Appendix, several excerpts from both the Louisiana Code (p. 43-49) and the French Code (p. 49-51); see *First Report from his Majesty's Commissioners on the Criminal Law (24th June 1834)*. London, 1834, en *Reports from Commissioners*, 22 volumes (8), Session 4 February-15 August 1834, vol. XXVI (1834), p. 117-177).

⁵⁴ On Western Australia, see R.G. Kenny, *An Introduction to Criminal Law in Queensland and Western Australia*. Seventh Edition. LexisNexis Butterworths, 2008, p. 1-10; Enid Russell, *A History of the Law in Western Australia and its Development from 1829 to 1979*. University of Western Australia Press, 1980, p. 233-238; Finn, "Codification of the Criminal Law: the Australian Parliamentary Experience," B. Godfrey & G. Dunstall (eds.), *Crime and Empire 1840-1940. Criminal Justice in Local and Global Context* (William Publishing, Cullompton, England, 2005), 224-237 (also available at http://ir.canterbury.ac.nz/bitstream/10092/1828/1/12590980_Codification%20of%20the%20Criminal%20Law.pdf, which I consulted on August 20, 2010).

⁵⁵ *The Criminal Code of Western Australia, and the Criminal Practice Rules of 1902*, with Index to the Act (1 & 2 Edwd. VII. No. 14) and the Code of Criminal Law set forth in the First Schedule thereof. Perth, W.M. Alfred Watson, Government Printer, 1902; *An Act to Amend the Criminal Code* (Assented to, 20th December, 1902, Western Australia). Perth, W.M. Alfred Watson, Government Printer, 1902; *An Act to Amend the Criminal Code* (Assented to, 20th December, 1902, Western Australia). Perth, W.M. Alfred Watson, Government Printer, 1902 (it contains only a repeal of Subsection 5 of Section 19; and an Amendment of Section 319); *An Act to Amend the Criminal Code* (Assented to 14th December, 1906, Western Australia). Perth, W.M. Alfred Watson, Government Printer, 1902; the current code of Western Australia is the *Criminal Code Act 1913*.

references to France can be found in the parliamentary debates,⁵⁶ but it does not seem to me they had any relevance in terms of reflecting a particular influence of the *Code pénal* over Western Australia criminal code.

In Spain, whereas in the approval of the 1822 criminal code there was not much parliamentary debate about the convenience to reform the criminal law through the codification scheme, the enactment of the 1848 criminal code was considerably different in this regard. Moreover, whereas in 1822 deputies seemed to feel a particular need and urgency to codify the criminal law,⁵⁷ in 1848 that was not the general opinion among the members of parliament.⁵⁸

Some of them strongly defended the cause for codification, presenting it as an urgent task which constituted an important duty of the parliament.⁵⁹ In so doing, there was no need to discuss the whole draft, following thus – according to some parliamentarians,⁶⁰ but not all of them –⁶¹ in the French's footsteps. Others were not that convinced about the convenience to codify the criminal law for different reasons: some thought that it would be much better to enact particular statutes rather than a general code;⁶² some held that important reasons had to exist to justify this drastic legislative measure;⁶³ some argued that there was no need to hurry on in getting the code approved, reminding the way in which the precedent criminal code had been promulgated;⁶⁴ another simply opposed to codify the criminal law,⁶⁵ although neither always strongly enough, nor in a coherent way.⁶⁶

Leaving aside the matter as whether the code was the proper way to reform the criminal law, the reader may ask whether the Napoleonic *Code pénal*, which had been promulgated in France in 1810, did draw much attention concerning the idea of promulgating a modern code.

The parliamentary debates show that, although the French criminal code was well known and mentioned as a legal text that had been consulted by the codes”

⁵⁶ A. Jamenson, the Minister for Lands, in moving the second reading of the Criminal Code Bill, was fully aware of and emphasized the fact that “this is probably the most comprehensive Bill which has ever come before the House”, and added: “It is a measure that simplifies and consolidates our criminal law, and thus is entirely in accordance with the progressive spirit of our time. Indeed, I think all progressive countries have a criminal code. I know that these remarks apply to France and Italy, and to all the Northern States of America. Both New Zealand and Queensland have a criminal code. Indeed, the criminal code of Queensland is really the source from which this code has been drawn”. (Western Australian Parliamentary Debates, WAPD, vol. XX, p. 2446 [22 January 1902]).

⁵⁷ DSC, Congreso, 22 de abril de 1821, p. 1156.

⁵⁸ On this matter, see Sanchez Gonzalez, *Los Códigos Penales de 1848 y 1850*, p. 93-96.

⁵⁹ (Seijas) “No hay nada más apremiante, señores, que la necesidad del Código penal” (DSC, Congreso, 13 de marzo de 1848, p. 1757).

⁶⁰ Pardo Montenegro, DSC, Congreso, 10 de marzo de 1848, p. 1706; Fernández Baeza, DSC, Congreso, 11 de marzo de 1848, p. 1732-1733; see also Seijas, DSC, Congreso, 15 de marzo de 1848, p. 1792.

⁶¹ Mayans, DSC, Congreso, 16 de marzo de 1848, p. 1809-1810.

⁶² Fernández Baeza, DSC, Congreso, 11 de marzo de 1848, p. 1734.

⁶³ Pidal, DSC, Congreso, 14 de marzo de 1848, p. 1772-1775; see Sánchez González, *Los Códigos Penales de 1848 y 1850*, p. 94-95.

⁶⁴ Corzo, DSC, Congreso, 15 de marzo de 1848, p. 1789.

⁶⁵ Gómez Laserna, DSC, Congreso, 14 de marzo de 1848, p. 1764-1768; on this matter, see Sánchez González, *Los Códigos Penales de 1848 y 1850*, p. 93-94.

⁶⁶ Gómez Laserna, DSC, Congreso, 14 de marzo de 1848, p. 1772.

drafters, it was never regarded and recognized it as model, except by those who wanted to criticize the draft or the Bill presented in the parliament for its approval, either for particular matters or for accepting a foreign legal source which may not be convenient for Spain.⁶⁷

One may think that this was due to the relatively recent Independence War occurred in Spain (1808-1814) as a consequence of the French invasion.⁶⁸ Although

⁶⁷ That was precisely the point made by Calatrava discussing a specific matter concerning the freedom of press, arguing that the French regulation could not work out in Spain; on this matter, see DSC, Congreso, 5 de febrero de 1822, p. 2169.

⁶⁸ The parliamentary debates of the period of the Independence War reveal the feelings of suspicion and hatred against the French; see, for example: DSC, Congreso, 9 de diciembre de 1810, p. 153: "...infernál política de Bonaparte"; DSC, Congreso, 16 de diciembre de 1810, p. 168: "...el despotismo francés en los reinos de España"; DSC, Congreso, 17 de diciembre de 1810, p. 182: "...excluidos los hijos de franceses...monstruos..."; DSC, Congreso, 17 de diciembre de 1810, p. 183: "...hijos, nietos y biznietos de los franceses"; DSC, Congreso, 17 de diciembre de 1810, p. 183: "...indignación contra los franceses"; DSC, Congreso, 17 de diciembre de 1810, p. 183: "...sangre francesa"; DSC, Congreso, 17 de diciembre de 1810, p. 183: "...los franceses son los mayores enemigos del género humano, y especialmente de España"; DSC, Congreso, 18 de diciembre de 1810, p. 185: "...resistir al furioso ímpetu de los franceses..."; DSC, Congreso, 19 de diciembre de 1810, p. 191: "...franceses, peores que los moros..."; DSC, Congreso, 19 de diciembre de 1810, p. 191: "...aun los mismos muertos le [a Napoleón] hacen la guerra..."; DSC, Congreso, 19 de diciembre de 1810, p. 193: "...infelices españoles que están en Francia"; DSC, Congreso, 20 de diciembre de 1810, p. 197: "...dar la propiedad de todo lo que quitasen a los franceses"; DSC, Congreso, 21 de diciembre de 1810, p. 204: "...que no imitemos a los franceses en este denominación de Poder ejecutivo, y creo sería más conveniente que continuase el nombre de Consejo de Regencia"; DSC, Congreso, 24 de diciembre de 1810, p. 223: "...perfidia francesa..."; DSC, Congreso, 28 de diciembre de 1810, p. 240: "...indulto a los afrancesados..."; DSC, Congreso, 29 de diciembre de 1810, p. 247: "...nación francesa"; DSC, Congreso, 29 de diciembre de 1810, p. 248: "...aborrecimiento a la tiranía y dominación extranjera"; DSC, Congreso, 29 de diciembre de 1810, p. 248: "...que no quede un solo francés en la Península"; DSC, Congreso, 29 de diciembre de 1810, p. 248: "...convertida la Península en Colonia francesa"; DSC, Congreso, 29 de diciembre de 1810, p. 250: "En España, por desgracia, hay algunos que siguen el partido de los franceses"; DSC, Congreso, 29 de diciembre de 1810, p. 250: "...formar un partido con los españoles franceses"; DSC, Congreso, 29 de diciembre de 1810, p. 252: "Temo mucha la perfidia de los franceses, la seducción de los afrancesados, el frío desaliento de los egoístas, y las instigaciones sordas de los que, atendiendo a sus intereses particulares, los hallan en contradicción con el nuevo orden de cosas que las Cortes han de introducir en el Estado"; DSC, Congreso, 29 de diciembre de 1810, p. 252: "...trata de sembrar la división en el Reino la perfidia francesa"; DSC, Congreso, 29 de diciembre de 1810, p. 252: "Que nada se trate con los franceses sin que primero evacuen la Península"; DSC, Congreso, 29 de diciembre de 1810, p. 252: "...una guerra eterna, no ya sólo al pérfido Napoleón y su raza, sino a toda la Francia misma y sus cobardes aliados..."; DSC, Congreso, 29 de diciembre de 1810, p. 253: "...esa serpiente de Francia derramó la ponzoña de la discordia en el seno de la familia reinante"; DSC, Congreso, 29 de diciembre de 1810, p. 254: "...inmensas usurpaciones de la embrutecida y ensangrentada Francia"; DSC, Congreso, 29 de diciembre de 1810, p. 254: La Francia amiga de España! Qué caprichoso delirio! Desde que las dos naciones existen, han sido siempre rivales..."; DSC, Congreso, 29 de diciembre de 1810, p. 254: "Guerra eterna, guerra de sangre y muerte contra la pérfida Francia!: antes perecer mil veces que capitular con ella"; DSC, Congreso, 29 de diciembre de 1810, p. 254: "...ahogar la perfidia y altanería francesa"; DSC, Congreso, 29 de diciembre de 1810, p. 255: "...caigamos al fin, y sin poder remediarlo, en las [manos] impuras de los franceses, todavía empapadas de la inocente sangre de nuestros padres y hermanos"; DSC, Congreso, 29 de diciembre de 1810, p. 255: "...declarar eterna guerra a la Francia..."; DSC, Congreso, 29 de diciembre de 1810,

that may be partly true concerning the 1822 criminal Code, it would not seem to be the case for the 1848 Code. Yet, it is surprising to realize that the reluctance to accept the influence of the French criminal code by both ‘codes’ drafters and supporters was stronger in 1848 than in 1822.

‘Deputies’ opinions were sometimes confusing concerning France as a nation. In other words, different views may be found among the members of parliament. In presenting or discussing the criminal codes, some used to praise and regard France as an enlightened and civilized nation. In this regard, the discourse given by José María Calatrava, the main drafter of the 1822 criminal code project, in presenting his project, was paramount. He criticized the fact that Spain had neglected for a while to follow the good example of its neighbor nations.⁶⁹ For him, it was time to follow the path of the nations who had codified their criminal laws,⁷⁰ referring to the “learned nations of Europe”,⁷¹ “the political societies of Europe”,⁷² or just the “nations of Europe”,⁷³ and encouraging the drafting of a criminal code which may be counted among the most learned ones in Europe.⁷⁴ As the reader can see, he did not mention France, as if it was taken for granted that the neighbor country was counted among the “learned

p. 257: “...que no hará la paz con Francia, y no cederá en esta santa guerra mientras no esté restablecido en España con entera libertad nuestro amado monarca...”; DSC, Congreso, 29 de diciembre de 1810, p. 257: “...han introducido en España las preocupaciones y los errores, y ahora intentan sujetarla al despotismo”; DSC, Congreso, 29 de diciembre de 1810, p. 257: “El pueblo español no quiso ser francés: el pueblo conoció bien la intención de Napoleón”; DSC, Congreso, 29 de diciembre de 1810, p. 258: “...del ave de rapiña de la Francia”; DSC, Congreso, 29 de diciembre de 1810, p. 258: “...aquellos dignos españoles, como nosotros, no quieren ser esclavos de los franceses”; DSC, Congreso, 29 de diciembre de 1810, p. 258: “...el pueblo español..., perecerá antes que ser francés”; DSC, Congreso, 29 de diciembre de 1810, p. 260: “...no se excederá nunca V.M. en tomar medidas de cautela contra los franceses. Es malísima gente, Señor, abominable, diabólica”; DSC, Congreso, 29 de diciembre de 1810, p. 260: “...el carácter fraudulento y doloso de los franceses, acreditada por la experiencia de todos los siglos...”; DSC, Congreso, 29 de diciembre de 1810, p. 261: “...para que vea ese monstruo que el pueblo español nunca será amigo de Francia”; DSC, Congreso, 29 de diciembre de 1810, p. 261: “Yo pido se declare que primero moriremos que dejarnos subyugar por ese infame [Napoleón]”; DSC, Congreso, 30 de diciembre de 1810, p. 264: “...nosotros peleamos con vándalos franceses, mucho más bárbaros que aquéllos”; DSC, Congreso, 30 de diciembre de 1810, p. 267: “...yugo francés”; DSC, Congreso, 30 de diciembre de 1810, p. 268: “...la idea de guerra eterna a la Francia, y alianza eterna con la Inglaterra”; DSC, Congreso, 30 de diciembre de 1810, p. 268: “...jamás debiera hacerse la paz con Francia”, advertencia de ministro Pitt a un monarca inglés; DSC, Congreso, 30 de diciembre de 1810, p. 270: “...los intereses de Francia han sido y serán eternamente que la España sea una provincia suya”; DSC, Congreso, 31 de diciembre de 1810, p. 272: “...debilitada (la Fe) con la corrupción de las costumbres y máximas francesas”.

⁶⁹ *Discurso de Presentación del Título preliminar*, CP 1822, in DSC, Congreso, 22 de abril de 1821, p. 1155.

⁷⁰ *Discurso de Presentación del Título preliminar*, CP 1822, in DSC, Congreso, 22 de abril de 1821, p. 1157).

⁷¹ *Discurso de Presentación del Título preliminar*, CP 1822: “La primera se halla adoptada por varias naciones cultas de Europa...” (DSC, Congreso, 22 de abril de 1821, p. 1157).

⁷² *Discurso de Presentación del Título preliminar*, CP 1822, in DSC, Congreso, 22 de abril de 1821, p. 1158.

⁷³ *Discurso de Presentación del Título preliminar*, CP 1822: “...las naciones de Europa, es un resto de los siglos bárbaros...” (DSC, Congreso, 22 de abril de 1821, p. 1158).

⁷⁴ *Discurso de Presentación del Título preliminar*, CP 1822, in DSC, Congreso, 22 de abril de 1821, p. 1159.

nations of Europe”.

Other parliamentarians of 1822 explicitly referred to France, sometimes along with England, as “the two most learned nations of the Universe”.⁷⁵ Some institutions also praised the 1822 criminal code project for having adopted some principles from the best criminal codes, not always mentioning the French code.⁷⁶

The same could be said about the parliamentarians of 1848, who liked to look at the European landscape,⁷⁷ regarded France and England as important nations,⁷⁸ and once labeled France as “one of the greatest legislators of the world”.⁷⁹ Some seemed to think that the fact that an institution could be hardly found in any European code may constitute an authoritative proof about its lack of expediency.⁸⁰ There were some exceptions, being Fernández Baeza one of them. He denounced the danger of looking too much at other legal systems while neglecting a deep analysis of the nature and principles which ever govern all the territories, no matter the specific circumstances they may go through.⁸¹

General references to the tradition of France – or just concerning specific matters – were neither frequent nor uncommon,⁸² sometimes even recognizing the French system as a model concerning some administrative matters,⁸³ foreign to criminal laws.

Along with these references to France, others were less positive. Some parliamentarians’ statements show a different view about France and its codes, including the criminal one, considering they did not reflect a free nation or free people.⁸⁴ Moreover, it was said that the French criminal code was approved to ensure a despotic exercise of government⁸⁵ or tyranny.⁸⁶ Similar criticisms would be made

⁷⁵ Álvarez de Sotomayor, DSC, Congreso, 17 de diciembre de 1821, p. 1332.

⁷⁶ *Observaciones previas ó generales que hacen en pró y en contra algunos de los informantes*: “La Audiencia de Valladolid opina que se ha adoptado en el proyecto los principios luminosos de los mejores Códigos criminales...” (DSC, Congreso, 23 de noviembre de 1821, p. 922).

⁷⁷ DSC, Congreso, 10 de marzo de 1848, p. 1712 (referring to the nations of Europe); DSC, Congreso, 10 de marzo de 1848, p. 1718 (referring to the Austrian criminal code); DSC, Congreso, 11 de marzo de 1848, p. 1734 (referring to some foreign criminal codes, the French and Brazilian ones among them).

⁷⁸ DSC, Congreso, 10 de marzo de 1848, p. 1709.

⁷⁹ (Pardo Montenegro) “Napoleón, por ejemplo, encargó al Consejo de Estado la formación de los Códigos que dio á la Francia y que le elevaron á la altura de unos de los grandes legisladores del mundo...” (DSC, Congreso, 10 de marzo de 1848, p. 1706).

⁸⁰ Seijas, DSC, Congreso, 10 de marzo de 1848, p. 1718.

⁸¹ Fernández Baeza, DSC, Congreso, 11 de marzo de 1848, p. 1734.

⁸² DSC, Congreso, 19 de diciembre de 1821, p. 1364; DSC, Congreso, 3 de diciembre de 1821, p. 1084; Calatrava, on the art. 791, DSC, Congreso, 1 de febrero de 1822, p. 2102; Rey, on the art. 791, DSC, Congreso, 1 de febrero de 1822, p. 2102, related to that, see also DSC, Congreso, 1 de febrero de 1822, p. 2103; DSC, Congreso, 13 de marzo de 1848, p. 1742; Corzo, DSC, Congreso, 13 de marzo de 1848, p. 1751; Pidal, DSC, Congreso, 14 de marzo de 1848, p. 1776 y 1777; Seijas, DSC, Congreso, 15 de marzo de 1848, p. 1792.

⁸³ DSC, Congreso, 19 de mayo de 1821, p. 1699.

⁸⁴ Calatrava, discussing the art. 526, DSC, Congreso, 22 de enero de 1822, p. 1959; Calatrava, discussing the art. 302, DSC, Congreso, 16 de enero de 1822, p. 1832.

⁸⁵ Gil de Linares, DSC, Congreso, 10 de diciembre de 1821, p. 1173.

⁸⁶ DSC, Congreso, 23 de noviembre de 1821, p. 923 (opinión from the *Colegio de abogados* of Madrid).

in the United States of America by those who opposed the codification scheme at the end of the 19th century.⁸⁷

The argument that the French code restricted the freedom much more than the Spanish one was used even in cases in which the Spanish code constrained considerably the scope of liberty of its citizens. In discussing the right to association, for example, Borrego showed his lack of conformity with the idea that any private association of 20 members required an express authorization before allowing them having a meeting.⁸⁸ Seijas replied by asserting that this was not a minor point. He based his argument upon principles and authority. Developing the latter, Seijas stated that enabling the constitution of associations everywhere without any authorization would affect to public order and social security. Resorting to authorities, he did dare to mention the French code, whose regulation had not changed from the 1830 revolution onwards, despite the many reforms made from that year.⁸⁹ Later on, he added, though, that the Spanish regulation was less strict than the French one, so “Spaniards will enjoy more liberty than the French”.⁹⁰ Borrego recognized and praised that the Spanish regulation granted more freedom to citizens than the French code, but lamented that the commission did not resort both to other European models whose legal regime on that matter was much better, and to the Spanish tradition and jurisprudence, which contained useful precedents of how to regulate the right to association with more spirit of liberty, since from the exercise of that right depended the moral, political and economic progress of the society.⁹¹

In addition to it, it is surprising to see the efforts made by the codes’ drafters to make clear that the *Code pénal* had not been used as a model and, consequently, that the French code was not the model of the Spanish criminal code. This can be seen in the 1822 code,⁹² but particularly in the 1848 one. Only in a few cases it was recognized that some specific article came from the French code.⁹³ Although some institutions somewhere reported that a group of articles, a whole title or book had been adopted from the *Code pénal*,⁹⁴ an assertion like that was never accepted by the codes’

⁸⁷ On this matter, see Masferrer, Aniceto: “The Passionate Discussion among Common Lawyers about postbellum American Codification: An approach to its Legal Argumentation” *Arizona State Law Journal* 40, 1 (2008), p. 173-256, particularly, p. 198-199 and 233-238; see also Masferrer, Aniceto: “Defense of the Common Law against postbellum American Codification: Reasonable and Fallacious Argumentation”, *American Journal for Legal History* 50.4 (2008-2010), p. 355-430.

⁸⁸ Borrego, DSC, Congreso, 16 de marzo de 1848, p. 1824.

⁸⁹ (Seijas) “... y el Código francés, que ha sufrido tantas reformas después de la revolución de 1830, está intacto en este punto” (DSC, Congreso, 16 de marzo de 1848, p. 1825).

⁹⁰ Seijas, DSC, Congreso, 16 de marzo de 1848, p. 1826.

⁹¹ Borrego, DSC, Congreso, 16 de marzo de 1848, p. 1827.

⁹² Calatrava, DSC, Congreso, 23 de noviembre de 1821, p. 924.

⁹³ (Rey, discussing the art. 789) “Yo por fin solo añadiré, ya que se ha hecho á la comisión la inculpación de haber modelado su Código por el Código francés, que aunque en general no es verdad, es exactísimo en cuanto á haberse tomado este artículo de él, porque los franceses son buenos economistas, y están más adelantados que nosotros en este ramo. Los ingleses también lo tienen, y así la comparación es exacta” (DSC, Congreso, 1 de febrero de 1822, p. 2101).

⁹⁴ (*Observaciones previas ó generales que hacen en pró y en contra algunos de los informantes*) “La [Audiencia] de Castilla La Nueva dice que el proyecto del Código (...) comprende disposiciones y capítulos enteros, pertenecientes á otro Código, como lo de acusaciones, rebeldías, ejecución de las sentencias etc., y particularmente lo relativo al Jurado, que no se debe anticipar hasta que las Cortes resuelvan silo há de haber, á cuyo fin cita la ley anterior que se proyectó para la sustanciación de causas criminales” (DSC, Congreso, 23 de

drafters.⁹⁵ Despite of it, some institutions, like the *Colegio de abogados* of Madrid, criticized the 1822 project for being drafted taking the French code as a model,⁹⁶ although in some occasions the same *Colegio* proposed to follow that model.⁹⁷

The main drafter of the 1822 criminal code, José María Calatrava, dared to recognize that “many things were taken from the French code”,⁹⁸ but this did not mean that the *Code pénal* had been the model of the whole 1822 project. He tried to make clear that the project was truly Spanish, considering the specific circumstances of Spain as a particular nation.⁹⁹ Whenever he could, he took advantage to show himself as apparently detached from the French system.¹⁰⁰ Other deputies made the similar point, denying that the French code had been used as a model but accepting that some specific articles of it had been used.¹⁰¹

As we said, the efforts made by the 1848 criminal code’s drafters to state that the *Code pénal* had not been used as a model were particularly strong. Seijas, the main drafter of the 1848 project, dared to state that although it could be generally said that the whole Europe was governed by the French criminal code, that code was, in his view, “the worst code of France”, so his commission rather resorted to the Brazilian code.¹⁰² Despite of it, the 1848 project was “a purely Spanish code”, and “it won’t be said it is French because it has no contact at all with it [referring to the *Code pénal*]; it won’t be said it belongs to another European country: not at all, the code

noviembre de 1821, p. 921); DSC, Congreso, 23 de noviembre de 1821, p. 923; see also DSC, Congreso, 23 de noviembre de 1821, p. 923 (*Colegio de Abogados* of Madrid).

⁹⁵ See, for example, DSC, Congreso, 23 de noviembre de 1821, p. 924; DSC, Congreso, 1 de febrero de 1822, p. 2101.

⁹⁶ DSC, Congreso, 23 de noviembre de 1821, p. 923.

⁹⁷ See, for example, Calatrava’s reproach to that Colegio in discussing the art. 526 of the 1822 Project: “El Colegio de Madrid dice que el artículo le parece durísimo con los superiores, que dará lugar a multitud de causas, y que el Gobierno debe velar y remover á los ineptos (...). Con este motivo elogia la disposición del Código francés sobre que los proveedores no puedan ser perseguidos en justicia sino por denuncia ó acusación del Gobierno. Yo no alcanzo ciertamente cómo el Colegio de Madrid recomienda una disposición que en mi concepto es uno de los mayores lunares que tiene aquel Código. Eso se inventó en tiempo de Bonaparte para que los asentistas y proveedores, en complaciendo al Gobierno, aunque sacrificasen a todos los demás, estuviesen á cubierto de esta pena, y aun de que se examinase su conducta en juicio; y yo creo que no es esto lo que conviene en España ni en ningún pueblo libre” (DSC, Congreso, 22 de enero de 1822, p. 1959); see also the footnote n. 148.

⁹⁸ DSC, Congreso, 23 de noviembre de 1821, p. 924 (see the footnote n. 92).

⁹⁹ Calatrava, DSC, Congreso, 23 de noviembre de 1821, p. 924; see also Calatrava, discussing the art. 16, DSC, Congreso, 3 de diciembre de 1821, p. 1089; Calatrava, discussing the art. 59, DSC, Congreso, 22 de diciembre de 1821, p. 1410; Calatrava, discussing the death penalty, DSC, Congreso, 22 de diciembre de 1821, p. 1414-1415; Calatrava, DSC, Congreso, 3 de enero de 1822, p. 1610; Calatrava, discussing the art. 255, DSC, Congreso, 14 de enero de 1822, p. 1807; Calatrava, discussing the art. 261, DSC, Congreso, 14 de enero de 1822, p. 1807-1808.

¹⁰⁰ Calatrava, discussing the art. 59, DSC, Congreso, 22 de diciembre de 1821, p. 1411.

¹⁰¹ DSC, Congreso, 1 de febrero de 1822, p. 2101 (see the footnote n. 93).

¹⁰² On the influence of the Brazilian code over the 1848 criminal Code, see On the influence of the Brazilian code over the 1848 SCC, see Alvarado, Javier: “La codificación penal en la España isabelina: la influencia del Código penal del Brasil en el Código penal español de 1848”, *España en la época de la fundación de la Guardia Civil*, ed. Ministerio del Interior, Madrid, 1994, p. 43-82; Iñesta Pastor, Emilia: *El Código penal de 1848*. Valencia, tirant lo blanc, 2010, p. 295-298.

we present [before the parliament] is purely Spanish”.¹⁰³ He particularly disregarded the 1822 criminal Code though.¹⁰⁴ The deputy Alonso did not agree with Seijas on this matter, stating that many articles came from the French code. Seijas denied it by saying that there were many differences between the articles of both codes. Alonso accepted the point made by Seijas but he added that he had detected at least twelve articles contained in the book of *faltas* very similar to that regulated in the Napoleonic code.¹⁰⁵

Seijas, in replying Alonso’s statement whereby the book of *faltas* had adopted the French code as a model, being thus a purely French product, argued demagogically that Alonso was true inasmuch as no code could avoid the regulation of some common criminal behaviors like homicide, parricide, theft, etc., which had already been regulated by the French code.¹⁰⁶ Alonso finally asserted that he just wanted to state that some articles had been copied from the French code, but it seemed – he carried on – that there was no will to recognize it.¹⁰⁷ Other deputies lamented that some aspects had not been regulated in line with the national jurisprudence, the customs and the Spanish legal tradition.¹⁰⁸

Parliamentary debates also contained explicit references to legal and doctrinal sources of the Spanish tradition, not necessarily to show that codes were really Spanish and not French or from any other foreign nation. More specifically, the 1822 project contained maxims from modern authors like Filangieri and Bexon, but also from 17th century lawyers like Matheu i Sanz and Antonio Gómez.¹⁰⁹ José María Calatrava mentioned some sources of the Spanish legal tradition in his discourses, emphasizing the importance of the *Partidas*,¹¹⁰ using them sometimes as an argument against other

¹⁰³ Seijas, DSC, Congreso, 10 de marzo de 1848, p. 1714-1715; Seijas, DSC, Congreso, 13 de marzo de 1848, p. 1758; see also Iñesta Pastor, *El Código penal de 1848*, p. 79-80, 294-298, and 300-302.

¹⁰⁴ (Seijas) “El Código penal que se discutió en España en 1822 después de oír a todo el mundo lo que quiso decir, después de largos y detenidos debates, hubo que abandonarle porque era muy malo”. (DSC, Congreso, 13 de marzo de 1848, p. 1758); it has been said that although deputies strove to undervalue the influence of the 1822 Code in the elaboration of the 1848, some articles of the Special Part show revealing similarities (Iñesta Pastor, *El Código penal de 1848*, p. 299-300).

¹⁰⁵ (Alonso) “Nos ha dicho el Sr. Seijas que el Código es todo español, que es puramente español, que no tiene contacto ninguno con el Código francés. Yo no quiero sino que se coteje el título francés “De las faltas” con el título “De las faltas” también de nuestro Código, y se verá que éste no es más que un traslado de aquel...”

El Sr. Seijas: hay mucha diferencias...

El Sr. Alonso: Hay diferencias, es cierto; ...lo menos 12 artículos conformes” (DSC, Congreso, 15 de marzo de 1848, p. 1791); on this matter, see also (Alonso) (DSC, Congreso, 15 de marzo de 1848, p. 1789).

¹⁰⁶ Seijas, DSC, Congreso, 15 de marzo de 1848, p. 1798.

¹⁰⁷ Alonso, DSC, Congreso, 15 de marzo de 1848, p. 1799.

¹⁰⁸ On this matter, see the view of the parliamentarian Borrego (DSC, Congreso, 16 de marzo de 1848, p. 1827).

¹⁰⁹ *Observaciones previas ó generales que hacen en pró y en contra algunos de los informantes*: “...y que entre las máximas de Filangieri y Bexon se han salpicado locuciones como las de Matheu y Antonio Gómez” (DSC, Congreso, 23 de noviembre de 1821, p. 922).

¹¹⁰ “...las Partidas usan de estas mismas palabras” (DSC, Congreso, 25 de noviembre de 1821, p. 964); Calatrava, DSC, Congreso, 27 de noviembre de 1821, p. 1001; (Calatrava) “La distinción del delito y de la culpa es mucho más antigua que nuestras leyes: todos saben cuán conocida es en el Derecho romano, del cual la tomaron los autores de nuestras Partidas” (DSC,

alternative ways of regulating particular matters.¹¹¹ In doing so, the deputy Gareli asked Calatrava whether there was any other Spanish legal source supporting what Partidas prescribed, citing also the *Fuero Real* and other *Pragmáticas* promulgated by Philip II, Philip V and Charles III.¹¹² Despite of it, few 1822 parliamentarians made references to historical legal sources.¹¹³

Few references were made by the main drafter of the 1848 penal code, Seijas, who criticized those who cited the text of Partidas excessively without realizing that it was not really applied by the tribunals.¹¹⁴ In Seijas view, Partidas should not be taken as a reference unless any of its specific texts were applied by judges.¹¹⁵ Other deputies like Maldonado and Pardo Montenegro seemed to be more attached to legal sources of the Spanish tradition.¹¹⁶

2) Formal or structural influence

The second level of influence of the French Napoleonic code concerns its contribution from the formal or structural point of view. In fact, the greatest legacy of the modern codification was more formal than substantive, being the division between the General Part and the Special Part the paramount example.

It is true that the division in these two Parts did not constitute an originality of the French criminal code,¹¹⁷ but its introduction in that code highly contributed to expand this division in the successive European codes. The parliamentary debates do not show any reluctance or controversy about this division in general terms. The same could not be said concerning specific aspects within the General Part.

Some notions, concepts, categories or institutions of the General Part, contained in the French criminal code, became a relevant reference for the drafters of other European codes, the Spanish one among them. This does not mean, however, that drafters used to follow the French reference. On the contrary, Spanish drafters intently departed several times from the French model. In distinguishing the different kinds of crimes, for example, while the Napoleonic code – following the 1791 criminal code¹¹⁸

Congreso, 27 de noviembre de 1821, p. 1001).

¹¹¹ (Calatrava) “Las Leyes de Partida previenen que se les disminuya el castigo, reconociendo que no merecen tanto como los adultos. Y nosotros iríamos ahora á imponer la pena de muerte á muchachos de esa edad? No podré convenir nunca en esto” (DSC, Congreso, 22 de diciembre de 1821, p. 1414-1415).

¹¹² DSC, Congreso, 22 de diciembre de 1821, p. 1415.

¹¹³ In addition to Calatrava and Gareli, see also Cepero’s discourse in DSC, Congreso, 27 de noviembre de 1821, p. 1002.

¹¹⁴ Seijas, DSC, Congreso, 10 de marzo de 1848, p. 1717.

¹¹⁵ Seijas, DSC, Congreso, 10 de marzo de 1848, p. 1717.

¹¹⁶ DSC, Congreso, 10 de marzo de 1848, p. 1706.

¹¹⁷ On this matter, see Schaffstein, Friedrich: “Tiberius Decianus und seine Bedeutung für die Entstehung des Allgemeinen Teils im Gemeinen deutschen Strafrecht”, in *Abhandlungen zur Strafrechtsgeschichte und zur Wissenschaftsgeschichte*. Darmstadt, Scientia Verlag Aalen, 1986, p. 199-226; see also Álvarez García, F. Javier: “Relaciones entre la parte general y la parte especial del Derecho Penal (I)”, *Anuario del Derecho Penal y de las Ciencias Penales* 46 (1993), f. III, p. 1021-1023; Masferrer, *Tradición y reformismo en la Codificación penal española...*, p. 114-117.

¹¹⁸ The classification into *crimes*, *délits* and *contraventions* was incorporated in the French Code in 1791 with the aim of capturing not only the different gravity of the crimes, but also their procedural diversity: Crimes were province of the *cours d’assies*; offences are in the

– introduced the distinction – depending upon the gravity of crimes and procedural diversity – between *crimes*, *délits* and *contraventions*,¹¹⁹ Spanish codes distinguished between *delito* and *culpa* (1822 SCC), or *delitos* and *faltas* (1848 SCC).¹²⁰ As far as punishments are concerned, whereas the French code distinguished between the “punishments of police” (for the commission of a contravention), “correctional penalties” (for a delict), “infamous punishments”, and “afflictive and infamous punishments” (for a crime),¹²¹ Spanish codes distinguished between corporeal – or physical – punishments (*penas corporales*), non-corporeal punishments (*penas no corporales*) and pecuniary punishments (1822 SCC, art. 28), or between corporeal punishments (*penas afflictivas*), correctional punishments (*penas correccionales*) and minor punishments (*penas leves*) (1848 SCC, art. 24).

The parliamentary debates contain some comments on these matters. The deputy Vadillo, for example, celebrated that French “correctional penalties” had not been adopted in the Spanish code.¹²² Calatrava criticized the erroneous criticism made by Conde de Toreno, who lamented the fact that the 1822 Spanish Project had imitated the French code in distinguishing “delito” and “culpa”.¹²³ In trying to define the notion of *delito*, parliamentarians discussed first of all the convenience to give a definition of crime in the code, bringing the French model into the discussion. Some maintained that the Napoleonic code made an effort in laying down the definition of crime. Others asserted that the French code did not contain a proper definition of criminal behavior in its different forms (*crimes*, *délits* and *contraventions*), just describing them depending on the kind of punishment they would bring with them.¹²⁴ Considering the fact that the Napoleonic code did not provide a true definition of crime, some maintained that there was no real need for a code to give that definition.¹²⁵ Other parliamentarians

domain of *tribunaux correctionnels*, and breaches are province of *tribunaux de police*, with a progressively simplified procedure.

¹¹⁹ Art. 1 FPC 1810: The offence which the laws punish with penalties of *police* is called a Contravention (*contravention*). The offence which the laws punish with *correctional* penalties is called a delict (*délit*). The offense which the laws punish with *afflictive* or *infamous* penalty is called a crime (*crime*).

¹²⁰ Spanish parliamentarians were fully aware that their code had willingly departed from the Napoleonic code, having rejected in general terms the French classification of crimes and punishments, and some of them seemed to be very proud of it (on this matter, see, for example, DSC, Congreso, 24 de noviembre de 1821, p. 938; the roots of this classification date back to the Roman tradition and later to the *ius commune* (*delicta atrocissima, gravia et levia*). From the *ius commune* comes the distinction between *delicta atrocissima, delicta gravia et delicta levia*. The first, also known as *atrociora*, were those for which the gravest punishment (more than simple death) were given; *gravia* (or *atrocía*), were those which had as a consequence the natural or civil death penalty; and *levia*, the ones assigned the remaining punishments; both the French and the Spanish codes departed then from that *ius-commune* model; Masferrer, *Tradición y reformismo en la Codificación penal española...*, p. 121; on the ‘atrocious crimes’ in the Castilian legal tradition, see Ramos Vázquez, Isabel: “La represión de los delitos atroces en el Derecho castellano de la Edad Moderna”, *Revista de Estudios Histórico-Jurídicos* [Sección Historia del Derecho Europeo] XXVI (Valparaíso, Chile, 2004), p. 255-299.

¹²¹ See the footnote n. 119.

¹²² Vadillo, DSC, Congreso, 24 de noviembre de 1821, p. 938.

¹²³ Calatrava, DSC, Congreso, 27 de noviembre de 1821, p. 1001.

¹²⁴ Gil de Linares, DSC, Congreso, 25 de noviembre de 1821, p. 964; Ramonet, DSC, Congreso, 25 de noviembre de 1821, p. 971; (La-Santa) “El Código francés, que se ha citado, no da definiciones de esta clase, porque decir que el crimen es aquel que se castiga con pena infamante ó corporal, no es dar definición alguna” (DSC, Congreso, 27 de noviembre de 1821, p. 1003); see also DSC, Congreso, 24 de noviembre de 1821, p. 938 (see the footnote n. 122).

¹²⁵ Conde de Toreno, DSC, Congreso, 27 de noviembre de 1821, p. 1001.

argued that the commission should be left free if it was not willing to follow the French distinction between *crime* and *delict*.¹²⁶

Calatrava took advantage of this discussion to emphasize the fact that the distinction between *delito* and *culpa* did not come from France but from some Spanish legal sources – like the *Partidas* – which in turn found their origin in the Roman law.¹²⁷ He was convinced, however, that it was highly convenient for the code to give a minimum idea about the notion of *delito*, even though that definition may not be very accurate, as it happened with the *Code pénal*, whose notion of *delict* was “not exact at all”.¹²⁸ Cepero maintained the opposite opinion, namely, it was much better not to give any definition of crime rather than giving an improper one.¹²⁹ He may agree with Gil de Linares’ assertion, for whom the words which composed a definition could become a matter of life or death for those who were governed by a criminal code.¹³⁰

It may probably be said that Spanish codes adopted, in general terms, the structure of the Napoleonic code, as many other European codes did, but it should be noted, first, that such structure was the result of the doctrinal approach to criminal law undertaken by *ius commune* lawyers before the French Revolution, and secondly, that many aspects of the formal or structural model of the French code had been introduced in previous criminal codes, which were considerably accurate or developed from the formal point of view.

In this sense, the systematization of criminal law, which may be regarded as a contribution of the codification movement, was not original, finding its origin in the doctrinal sources. Thus, the separation between the General Part and the Special Part, the classification of crimes and punishments, the circumstances of criminal responsibility, etc., located in the General Part had been carefully and systematically analyzed by the doctrine, although they hardly appeared in the legislation prior to codes. So systematization constituted a great – but not original – contribution of the codification scheme to the modern criminal law.¹³¹ The originality consisted sometimes in turning the Latin expression of developed institutions into a modern, vernacular language: it is the case of the expression “*moderamen inculpatae tutelae*”, which the 1791 and 1810 codes called it “self-defence”,¹³² expression which would

¹²⁶ Victorica, DSC, Congreso, 25 de noviembre de 1821, p. 971.

¹²⁷ (Calatrava) “La distinción del delito y de la culpa es mucho más antigua que nuestras leyes: todos saben cuán conocida es en el Derecho romano, del cual la tomaron los autores de nuestras Partidas” (DSC, Congreso, 27 de noviembre de 1821, p. 1001).

¹²⁸ Calatrava, DSC, Congreso, 27 de noviembre de 1821, p. 1002.

¹²⁹ Cepero, DSC, Congreso, 27 de noviembre de 1821, p. 1002.

¹³⁰ Gil de Linares, DSC, Congreso, 25 de noviembre de 1821, p. 964.

¹³¹ On this matter, see Masferrer, *Tradicón y reformismo en la Codificación penal española*, p. 109 ff.; Masferrer, “Codification of Spanish Criminal Law in the Nineteenth Century...”, p. 111 ff.

¹³² The French Penal Code of 1791 was the first to substitute the old expression “*moderamen inculpatae tutelae*” with “self defense”, and from there moved on to the Code Napoleon of 1810, although both codes curiously placed the institution in the Special Part and not in the General Part. The most important aspects revolved around the requisites required for necessary defense, structured around the generic expression “*cum moderamine inculpatae tutelae*”, introduced by Innocence III in the *Decretales (De Homicidio c.18, X)*: the current illegal aggression; the *moderamen inculpatae tutelae*, that is, the *modus defensionis*, that constituted “the true innovation” introduced by canon law in self-defense, and the defense of the wealthy goods. Regarding the ethical implication given by canon law to self-defense, this logically ceased with the Enlightenment. Therefore canon law strongly contributed to the later evolution; on the development of self-defense from a comparative perspective, see Iglesias Río, Miguel Ángel: *Perspectiva histórico-cultural y comparada de la legítima defensa*, Prologue by Dr. D.

be adopted by all subsequent European codes.

3) The substantive influence

What should be said about the influence of the Napoleonic Code over the codification of Spanish criminal law from the substantive point of view? In other words, to which extent was the substantive criminal law of the French code adopted in the Spanish codes?

It seems to me that whereas the French influence is quite evident concerning the *Code pénal* as a legal tool and from its formal point of view, the influence was much weaker from the substantive perspective. Several reasons explain my view:

1) Spanish criminal law had a long and strong tradition, both from the legal and doctrinal point of view. This can be seen in particular criminal law institutions whose regulation differed from that contained in the French code (classification of crimes and punishments, as well as the specific legal regime of some punishments which reveal their historical attachment rather than the adoption of the French model), as it will be seen.

2) The reluctance of some lawyers to resort to the French model if the Spanish tradition provided its own institutions, as I have shown. This reluctance can sometimes be seen either in deputies' opinions, or in the commentators' works, where lawyers emphasized the cases in which the Spanish regulation had differed or deviated from the French model.¹³³

3) As it is well known, several criminal codes were promulgated in Spain: 1822,¹³⁴ 1848-1850,¹³⁵ 1870,¹³⁶

Ángel Torío López (1999); see also Masferrer, *Tradición y reformismo en la Codificación penal española...*, p. 132-137; Masferrer, "Codification of Spanish Criminal Law in the Nineteenth Century..." , p. 122-124.

¹³³ See, for example, Groizard Y Gómez De La Serna, *El Código penal de 1870 concordado y comentado*, vol. II, p. 236-237.

¹³⁴ Sainz Guerra, Juan: "José María Calatrava o la Codificación penal a comienzos del siglo XIX", *Estudios de Historia de las Ciencias Criminales en España* (J. Alvarado y A. Serrano Maillo, eds.). Madrid, Dykinson, 2007, p. 351-384; Torres Aguilar, Manuel: *Génesis parlamentaria del Código penal de 1822*. Sicania University Press, 2008; see also Casabó Ruíz, José R.: *El Código penal de 1822* (Doctoral thesis, Valencia, 1968, unpublished).

¹³⁵ Sánchez González, *Los Códigos Penales de 1848 y 1850*, cited in the footnote n. 40. Iñesta Pastor, *El Código penal de 1848*, cited in the footnote n.102; Alvarado, "La codificación penal en la España isabelina: la influencia del Código penal del Brasil en el Código penal español de 1848", already cited in the footnote n.102; Castejón, F.: "Apuntes de historia política y legislativa del Código penal de 1848", *Revista General de Legislación y Jurisprudencia*, Madrid, 1953, p. 105-113; Revuelta Benito, R.: "El Código penal de 1848 y su gran comentarista don Joaquín Francisco Pacheco", *Revista de Estudios Penales*, núm. 6, 1945, p. 31 ff.; Virto Larruscain, M. J.: *El caso fortuito y la construcción del sistema de culpabilidad en el Código penal de 1848*. Bilbao, 1984; González Miranda y Pizarro, J.: *Historia de la Codificación penal española y crítica del Código vigente* (doctoral Thesis, unpublished), Madrid (without date); see also the bibliography cited in the footnote n.40.

¹³⁶ Núñez Barbero, Ruperto: *La reforma penal de 1870*. Salamanca, 1969; Anton Oneca, José: "El Código Penal de 1870", *Anuario del Derecho Penal y de las Ciencias Penales* 23 (1970), p. 229-251; López Barja De Quiroga, Jacobo: "El Código penal de 1870 y su contexto histórico", *Centenario del Código civil* (coord. E. Tierno Galván). Madrid, 1989, vol. II, p. 477-491; Pérez-Prendes Y Muñoz De Arraco, José Manuel: "La prensa y el Código penal de 1870", *Hispania* 31 (1971), p. 551-579; Rosal, Juan del: "La palabra y la expresión en el Código de 1870", *Cosas de Derecho penal*. Madrid, 1973, p. 67-132; Fiestas Loza, Alicia: "La libertad de imprenta en las dos primeras etapas del liberalismo español", *Anuario de Historia del Derecho Español* 59 (1989), p. 351-490; Castejón, F.: "Las ideas penales en la época del Código penal de 1870", *Commemoración del centenario de la Ley provisional sobre*

1928¹³⁷, 1932,¹³⁸ 1944¹³⁹ and 1994). However, the most important one was that of 1848, which was the main model and reference of the following ones. If the code of 1822 contained many institutions coming from the Spanish legal tradition, being the 1810 French code the main foreign influence, the code of 1848 shows a much richer and diverse foreign influence (particularly the 1830 Brazilian code),¹⁴⁰ resorting considerably to the Spanish legal tradition. This does not mean that the French influence was absent. It was present, but less strong than it may seem, and also less strong than it has usually been supposed or assumed by Spanish lawyers.

A complete analysis of the influence of the French penal code over the Spanish codification goes beyond the limits of this paper, since it would require a detailed study of each and every article, comparing it to that of France and looking at the

organización del Poder Judicial y del Código penal de 1870, Real Academia de Jurisprudencia y Legislación, Madrid, 1970; Cobo Del Rosal, M.: “El sistema de penas y el arbitrio judicial en el Código penal de 1870”, en conmemoración del centenario de la Ley provisional sobre organización del Poder Judicial y del Código penal de 1870, *Real Academia de Jurisprudencia y Legislación*, Madrid, 1970, p. 69-89; Del Rosal, J.: “La palabra y la expresión en el Código penal de 1870”, *Commemoración del centenario de la Ley provisional sobre organización del Poder Judicial y del Código penal de 1870*. Academia de Jurisprudencia y Legislación, Madrid, 1970.

¹³⁷ Jiménez De Asúa, L. / Antón Oneca, J.: *Derecho penal conforme al Código penal de 1928. Parte general*. Madrid, 1929; Antón Oneca, J.: “Los antecedentes del nuevo Código penal”, *Revista General de Legislación y Jurisprudencia* 154 (1929), p. 30-61; Castejón, F.: *Derecho penal, Criminología general y especial ajustada a la legislación española vigente hasta fin de 1930*, vol. I, Madrid, 1931; Cuello Calón, E.: *El nuevo Código penal español*, Barcelona, 1929; Cuello Calón, E.: *Código penal de 8 de septiembre de 1928*, Barcelona, 1929; Fabregas del Pilar, J.M.: “El nuevo Código penal y el discurso del Señor Ministro de Gracia y Justicia en la apertura de los Tribunales”, *Revista General de Legislación y Jurisprudencia*, 1928, p. 282 ff.; Jaramillo García, A.: *Novísimo Código penal, comentado y cotejado con el de 1870*, Salamanca, 1928; Pessini Pulido, A.: “El nuevo Código penal”, *Revista General de Legislación y Jurisprudencia* 154 (1929), p. 314-322; more recently, Cobo Del Rosal, Gabriela: “Codificación en un periodo de alteración de los Derechos Fundamentales: el Código penal de 1928”, *Estado de Derecho y derechos fundamentales en la lucha contra el terrorismo. Una aproximación multidisciplinar (histórica, jurídico-comparada, filosófica y económica)* (Aniceto Masferrer, ed.), Madrid, Thomson-Aranzadi, 2011.

¹³⁸ Cuello Calón, E.: *Exposición del Código penal reformado de 1932*. Barcelona, 1933; Castejón, F.: *Derecho penal, Criminología general y especial*, t. I, Madrid, 1935; Jiménez De Asúa, L.: *La Legislación penal de la República española*, vol. LI, Madrid, 1932; Jiménez De Asúa.: “El Derecho penal vigente en la República española”, *Revista de Derecho Público*, year I, vol. I (February 1932), p. 39-48; Jiménez De Asúa: *Código penal reformado de 27 de octubre de 1932 y disposiciones penales de la República*, vol. LV, Madrid, 1934; Puig Peña, F.: *Código penal reformado*, Madrid, 1934; López-Rey Y Arrojo, M. / Álvarez Valdés, F.: *El nuevo Código penal*, Madrid, 1933.

¹³⁹ Castejón, F.: “Génesis y breve comentario del Código penal de 23 de diciembre de 1944”, *Revista General de Legislación y Jurisprudencia* 9 (1945), p. 170 ff., 327 ff., 457 ff., and 634 ff.; Cuello Calón, E.: “Reformas introducidas en el Código penal y en las Leyes penales especiales por la Legislación del nuevo Estado”, *Revista de la Facultad de Derecho*, Madrid, 6-7 (July-December 1941), p. 37-51; Cuello Calón, E.: *Derecho penal conforme al Código penal, Texto Refundido de 1944. Parte general*. Madrid, 1946; Cuello Calón, E.: *Manual de Derecho penal español conforme al nuevo Código penal. Parte general*, Barcelona, 1945; Del Rosal, J.: “Ideas histórico-dogmáticas del Código penal de 1944”, *Información jurídica*, Madrid 54 (1947), p. 3-38; Ferrer Sama, A.: *Comentarios al Código penal*. Murcia, 1946 (vol. I) and 1947 (vol. II); Sánchez Tejerina, I.: *Derecho penal español*. Madrid, 1945.

¹⁴⁰ On the influence of the Brazilian code over the 1848 SCC, see the bibliography cited in the footnote n.102.

materials used by the drafters. So, I will briefly describe two aspects: first, the explicit references made by the deputies on the French code; and secondly, I will try to unveil the common myth about the French influence over the Spanish codes by giving some examples of criminal-law institutions which I studied in the past.

In addition to the references to the French code made by parliamentarians of the 1822 and 1848 I have already mentioned, others – not many – were made to compare specific criminal institutions which were more or less close to the *Code pénal*.¹⁴¹ The majority of the comparative comments (between the Spanish project and the Napoleonic code) made by parliamentarians dealt with punishments, rather than both the description of the crime and procedural matters. Whereas sometimes deputies showed themselves satisfied by the fact that the Spanish project had luckily departed from the French text, others they seemed to long for adopting the French regulation. Some statements even mixed both feelings.¹⁴² Let us see some cases.

In justifying, in the Discourse of the Preliminary Title, the regulation of the punishment of “*marca*”, the case of France was mentioned, since whereas the 1791 code abrogated that penalty, the 1810 code reintroduced it to deal with recidivism. So that punishment was not reintroduced to seek the humiliation or degradation of the convicted, but just as a measure to know as to whether the accused had been previously condemned. The 1822 commission, which first doubted about the convenience to introduce it in the Project,¹⁴³ decided to do it with the same purpose, that is, as a measure to deal effectively with recidivism,¹⁴⁴ although it was imposed less frequently than the French code did, as the *Colegio de abogados* of Madrid noted.¹⁴⁵

In debating on the death penalty, the comparative reference to France and England arose, either to analyze the convenience to introduce it in the code,¹⁴⁶ or just with the clear purpose of justifying its introduction in the penalty system.¹⁴⁷ Referring

¹⁴¹ Parliamentarians strove to make comparisons with the French code taking into account the Spanish social and legal background, although not always succeeded in this regard, as one of them reproached to another in discussing the article 41 of the 1822 Project: Pidal, DSC, Congreso, 14 de marzo de 1848, p. 1778.

¹⁴² This can be seen, for example, in the discussion of the art. 18 of the General Part, where Gil de Linares affirmed: “Cité el Código francés, no porque deba servir de modelo para el nuestro, sino porque siendo un Código formado para afianzar el despotismo, se vé en él, no obstante, que no se impone la misma pena á todos los receptadores, sino á aquellos que lo son por hábito o profesión, y ni siquiera se hace mención de los que proporcionaban la fuga de un criminal...” (DSC, Congreso, 10 de diciembre de 1821, p. 1173).

¹⁴³ (*Discurso de Presentación del Título preliminar*, CP 1822) “Dudó al principio la Comisión sobre la pena de deportación y sobre la marca. La primera se halla adoptada por varias naciones cultas de Europa...” (DSC, Congreso, 22 de abril de 1821, p. 1157); (*Discurso de Presentación del Título preliminar*, CP 1822) “Pero la Asamblea Constituyente de Francia, siguiendo los pasos del gran Duque de Toscana, desterró la marca del código publicado en 1791. Pero se volvió á restablecer en el de 1810 con varias modificaciones” (DSC, Congreso, 22 de abril de 1821, p. 1158).

¹⁴⁴ (*Discurso de Presentación del Título preliminar*, CP 1822, DSC, Congreso, 22 de abril de 1821, p. 1158).

¹⁴⁵ Calatrava, discussing the art. 401 of the 1822 Project, DSC, Congreso, 21 de enero de 1822, p. 1934; the *Colegio de abogados* of Madrid seemed to be very acquainted with the French code, as its report contained many references to it, at least compared to those given by other institutions which also sent their reports about the 1822 Project.

¹⁴⁶ DSC, Congreso, 10 de marzo de 1848, p. 1709.

¹⁴⁷ DSC, Congreso, 17 de diciembre de 1821, p. 1332 (see the footnote n.75).

to specific articles, the *Colegio de abogados* of Madrid lamented that art. 347 of the 1822 project did not provide the death penalty, as it did the French code for the same crime.¹⁴⁸ Calatrava took advantage of it to criticize the lack of coherence of that *Colegio*, since whereas it had criticized the excessive imposition of the death penalty on the one hand, later on seemed to be willing to impose it more frequently on the other.¹⁴⁹ The same *Colegio* requested to impose the death penalty to the arsonist, even when no homicide had been caused by – or derived from – the arson attack, as the Napoleonic code provided. Calatrava, talking on behalf of the commission he presided, rejected this proposal for he regarded it too severe.¹⁵⁰ The same did Calatrava with other proposals whose supporters’ arguments were mainly based upon the regulation of the French code.¹⁵¹

That the *Code pénal* was particularly severe was very well known and generally recognized. This explains why exceptional cases, in which the French code’s punishments seemed to be softer than usually, were explicitly remarked by deputies.¹⁵² The *Colegio de abogados* of Madrid was not always for the severity of punishments, as it happened with the art. 401 of the 1822 Project, in which – as Calatrava reported – that *Colegio* praised that the Spanish text had departed from the severity of the French code.¹⁵³ José María Calatrava made good use of all opportunities he had to emphasize the lenity of his project compared with the severity of the *Code pénal*. In replying those who wanted to impose the death penalty to 17-year-old convicts, he commented: “Are we going to be more severe in our Code than it is the French one?”¹⁵⁴

Calatrava was in charge to reply all the criticisms made by legal institutions which had sent their reports to the Parliament.¹⁵⁵ Sometimes, the institutions mentioned the French code if they found it more accurate or consistent. This is what the *Audiencia* (a tribunal) of Madrid did, complaining about the 1822 Project for being too long (around 800 articles), when the *Code pénal* had only 400 articles. Calatrava made good use of these comparisons to show his sharpness, by saying that “if what matters is to draft an incomplete code, then I could follow the French model, feeling myself able to draft it even shorter than the French one”.¹⁵⁶

Arguing in 1848 about the imposition of the death penalty for the commission of political crimes, Gómez Laserna stated that, before that penalty was abrogated in

¹⁴⁸ The 1822 Project can be seen in DSC, Congreso, 22 de abril de 1821, p. 1155-1226.

¹⁴⁹ Calatrava, discussing the art. 347 of the 1822 Project, DSC, Congreso, 20 de enero de 1822, p. 1915.

¹⁵⁰ (Calatrava, discussing the art. 800 of the 1822 Project) “El Colegio de Madrid dice que tiene por más justa la pena de muerte que impone el Código francés al incendiario aunque no resulte homicidio. En esto no puede convenir la comisión, como ya lo dije en el art. 641” (DSC, Congreso, 1 de febrero de 1822, p. 2103).

¹⁵¹ See, for example, DSC, Congreso, 23 de noviembre de 1821, p. 923; DSC, Congreso, 22 de diciembre de 1821, p. 1409; DSC, Congreso, 16 de enero de 1822, p. 1832; DSC, Congreso, 20 de enero de 1822, p. 1915; DSC, Congreso, 22 de enero de 1822, p. 1959; DSC, Congreso, 1 de febrero de 1822, p. 2103; DSC, Congreso, 5 de febrero de 1822, p. 2169.

¹⁵² (Calatrava, sobre el art. 742) “El Colegio de Madrid observó que el artículo, según se presentó al principio, que faltaban algunas excepciones a favor de los hijos, mujeres, etc., añadiendo que era más benigno en esta parte el Código francés” (DSC, Congreso, 31 de enero de 1822, p. 2086); see also DSC, Congreso, 3 de enero de 1822, p. 1610.

¹⁵³ Calatrava, discussing the art. 401 of the 1822 Project, DSC, Congreso, 24 de enero de 1822, p. 2085.

¹⁵⁴ Calatrava, DSC, Congreso, 22 de diciembre de 1821, p. 1414-1415.

¹⁵⁵ These reports can be seen in DSC, Congreso, 23 de noviembre de 1821, p. 921 ff.

¹⁵⁶ Calatrava, DSC, Congreso, 23 de noviembre de 1821, p. 925.

France, he was already against its imposition for the conviction for these particular crimes.¹⁵⁷

It was also Gómez Laserna who, criticizing the severity of the “*interdicción civil*” laid down in the 1848 Project, asserted that this punishment was somehow worse than the “civil death” regulated in the French code.¹⁵⁸

In discussing procedural law matters, references to the French model were also made. The procedure had to ensure as much as possible that no innocent person would be convicted and executed, avoiding tragic episodes occurred in France, where some tribunals had to declare the innocence of some convicted to death penalty once they had been executed.¹⁵⁹ Other procedural matter whose debate led parliamentarians to mention the French code was the cases of “*retractación*”, that is, the cases in which the execution should be interrupted.¹⁶⁰

Particularly controversial was the question as to whether fugitives should be judged by a popular tribunal called “*Jurado*” or by an “extraordinary tribunal”. Martínez de la Rosa maintained that the accused that was fugitive should be judged by the *Jurado* and not by a special tribunal, as the French code prescribed.¹⁶¹ Calatrava recognized that the commission took into consideration the *Code pénal* in this respect, although – as he said – that *Code* was not particularly well regarded in general terms by its members. Eventually the commission decided that fugitives should not be judged by a *Jurado* because they did not deserve it and the “public good” required that these accused followed an extraordinary procedure.¹⁶² Romero Alpuente criticized the option the commission had chosen, because after departing from the French model (which set up a special – or extraordinary – tribunal), it was just prescribed that these accused would go through an “extraordinary and short procedure” which did not seem to safeguard the ordinary guarantees.¹⁶³ Calatrava replied Romero Alpuente’s objections by reproaching his lack of coherence in criticizing a commission’s option of establishing an “extraordinary procedure”, which was similar to that adopted by the French code Romero Alpuente regarded so much.¹⁶⁴

¹⁵⁷ Gómez Laserna, discussing about the convenience to impose the death penalty to the convicts for political crimes, DSC, Congreso, 13 de marzo de 1848, p. 1742.

¹⁵⁸ Gómez Laserna, DSC, Congreso, 14 de marzo de 1848, p. 1769.

¹⁵⁹ “...y nos expondríamos, con escándalo de la humanidad, á ver lo que ha sucedido en Francia y en otras partes, cuando los tribunales han tenido que declarar inocentes á personas que habían hecho morir en un suplicio por falsas pruebas ó por la precipitación con que fueron juzgadas” (DSC, Congreso, 19 de diciembre de 1821, p. 1364).

¹⁶⁰ Romero Alpuente, discussing the art. 35 of the 1822 Project, DSC, Congreso, 19 de diciembre de 1821, p. 1364.

¹⁶¹ (Martínez de la Rosa, discussing the art. 59 of the 1822 Project) “Más diré: si la mente de la comisión, según han explicado sus individuos, es admitir la disposición del Código francés, y no someter al juicio de jurados estos delincuentes, también me opongo, porque la calidad de ser prófugo el acusado no debe privar á un español de la ventaja de este juicio” (DSC, Congreso, 22 de diciembre de 1821, p. 1410).

¹⁶² (Calatrava, discussing the art. 59 of the 1822 Project) “...nos ha citado como respetable el ejemplo del Código francés. Aunque no lo es mucho para la comisión, esta lo ha tenido presente, y ha creído que no solo porque tales reos no merecen otra cosa, sino porque el bien público lo exige, conviene que sean juzgados de una manera extraordinaria” (DSC, Congreso, 22 de diciembre de 1821, p. 1410).

¹⁶³ Romero Alpuente, discussing the art. 59 of the 1822 Project, DSC, Congreso, 22 de diciembre de 1821, p. 1409.

¹⁶⁴ (Calatrava, discussing the art. 59 of the 1822 Project) “...y si no me equivoco, al decir que debíamos respetar el ejemplo que nos dan los franceses señalando un juicio extraordinario para

Parliamentary debates hardly contain references to the influence of French code concerning specific criminal behaviors, leaving aside the controversy I already referred to about the book of “faltas”.¹⁶⁵

An isolated reference or mention to the French code can be seen in discussing the article 302 of the 1822 Project concerning the crime of rebellion or sedition (“*motín*”, in Spanish). Lagrava commented that the requirement of 40 people as a constitutive element of the crime of rebellion was excessive, being 20 – as the *Code pénal* prescribed – more than enough.¹⁶⁶ Calatrava’s answer was drastic: since the French code did not contain the distinction between “*motín*” (rebellion or sedition) and “*asonada*” (violent protest), that *Code* should not have more authority than the *Cortes*, which had decided that 40 people were required for the crime of *sedición*.¹⁶⁷

Another reference to the *Code pénal* can be seen in discussing the art. 589 of the 1822 Project. This article laid down the criminal behavior of those who rejected to be witness or give testimony. Sánchez Salvador asserted that that article would be improved by establishing what the French code prescribed, namely, the concession of an economic compensation for those who could not work that day for giving testimony in the criminal trial.¹⁶⁸ Calatrava accepted the proposal and added that this aspect would be introduced in the procedural code.¹⁶⁹

It would be wrong, from the substantive point of view, to regard as a French code’s influence the introduction of some political criminal law reforms which, originated on the political or constitutional level, were eventually introduced in the codes: it is the case of the principle of legality (concerning both the crime and its punishment), the proportionality between crime and punishment, the individuality of punishment, favorable decision, favorable interpretation, and the presumption of innocence, principles I mentioned at the beginning of this paper.¹⁷⁰

From this perspective, it should be noted that the influence of the principle of legality over other European jurisdictions – Spain, among them – was not mainly caused by the impact of the French code but by that of the above mentioned, modern constitutions (starting with that of France promulgated in 1791) and *Declarations* (particularly the 1789 one).¹⁷¹ However, it is also true that, once this principle was

estos casos, parece que lejos de impugnar la idea de la comisión, la apoya” (DSC, Congreso, 22 de diciembre de 1821, p. 1409).

¹⁶⁵ See footnotes nn. 105 ff., and their main texts.

¹⁶⁶ (Lagrava, discussing the art. 302 of the 1822 Project) “Pero como son diferentes las penas de uno y otro delito, quisiera se pusiera el número de 20 personas como en Francia, para que siendo mayor la pena, se retrajesen de estos movimientos” (DSC, Congreso, 16 de enero de 1822, p. 1832).

¹⁶⁷ (Calatrava, discussing the art. 302 of the 1822 Project) “El Código de Francia no distingue motivos de *asonada*, y no debe ser autoridad para nosotros superior á la de estas Cortes, que señalaron el número de 40 personas para la *sedición*” (DSC, Congreso, 16 de enero de 1822, p. 1832).

¹⁶⁸ (Sánchez Salvador, discussing the art. 589 of the 1822 Project) “...pero quisiera que así como en la legislación francesa se dice que á los que tengan que declarar separándoles de su trabajo, se les abone una gratificación, se hiciese aquí lo mismo” (DSC, Congreso, 24 de enero de 1822, p. 1983).

¹⁶⁹ Calatrava (discussing the art. 589 of the 1822 Project), DSC, Congreso, 24 de enero de 1822, p. 1983.

¹⁷⁰ See the footnote n. 4, and its main text.

¹⁷¹ On this matter, see Masferrer, “The Principle of Legality and Codification in the 19th-century Western Criminal Law Reform”, cited in the footnote n. 39; see what has been said in

adopted in the French code, this legal source did play a role in contributing to its expanding effect to other jurisdictions.

Despite of it, it should be emphasized that the generalization of the principle of legality in the Western legal tradition was the result of a broader movement which encompassed several European codes. The early codes observed, then, the principle of legality without accepting all of its consequences: it was the case of the Prussian Code of 1721 (*Verbessertes Landrecht*), the Swedish Law of the Realm of 1734, the *Codex juris criminalis* of Bavaria (1751) and the Austrian Code of 1769 (*Constitutio Theresiana*). The first European criminal code that established without ambiguity the principle of legality, expressly forbidding both judicial discretion and analogy, was the Austrian Code of 1787 (*Allgemeine Gesetz über Verbrechen und Strafen*), enacted by of Joseph II.¹⁷² The French code of 1791 established a regime of legality that was too inflexible with a fixed punishment and abolished any possible pardon. Such inflexibility was corrected by the French criminal code of 1810.¹⁷³ The Bavarian code of 1813,¹⁷⁴ inspired – if not drafted – by Feuerbach,¹⁷⁵ also introduced the principle of legality with all of its consequences, thus excluding – theoretically, not in practice – any possible judicial discretion and analogy, and affirming this principle “more

the first pages of this article (footnotes n. 7 ff., and their main texts).

¹⁷² That was the opinion of Bar, Karl Ludwig von: *A History of Continental Criminal Law* (1916), p. 252; see Hall, Jerome: “Nulla Poena sine Lege”, (1937-1938) *Yale L. J.* 168; in Ancel’s view, the Tuscany code of 1786 “drawn up by a commission headed by Beccaria”, would be the first which contained a consistent recognition of the principle of legality, constituting “historically the first legislative codification expressing the new penal law of continental Europe”. (Ancel, “The Collection of European Penal Codes...”, p. 344); in 1803, this code was revised, preserving the principle of legality.²²

¹⁷³ The French criminal code of 1810 adopted, however, the principle of legality in a more flexible way, giving judges a legal minimum and a maximum within which they could act. This model was introduced in a number of European countries; on the relationship between the French criminal codes of 1791 and 1810, see Masferrer, “Continuismo, reformismo y ruptura en la Codificación penal francesa...”, cited in the footnote n. 25; see also Ancel, “The Collection of European Penal Codes...”, p. 345.

¹⁷⁴ On this code and its relationship with Feuerbach, see Karl Geisel, *Der Feuerbachsche Entwurf von 1807: sein Strafsystem und dessen Entwicklung. Ein Beitrag zur Entstehung des Bayerischen Strafgesetzbuches von 1813*. Göttingen, 1929; Edwin Baumgarten, “Das bayerische Strafgesetzbuch von 1813 und Anselm von Feuerbach”, *Der Gerichtssaal* 81 (1913), Stuttgart, p. 98 f.; Karl Arnold, “Erfahrungen aus dem bayerischen StGB vom Jahre 1813 und Betrachtungen hierüber”, *Archiv des Criminalrechts*, Halle 1843, p. 96 ff., p. 240 ff., 377 ff., 512 ff.; 1844, p. 190 ff.

¹⁷⁵ Paul Johann Anselm von Feuerbach, *Lehrbuch des gemeinen in Deutschland gültigen peinlichen Rechts* (Gießen, 1801); *ibidem*, Über die Strafe als Sicherungsmittel vor künftigen Beleidigung des Verbrechens. Nebst einer näheren Prüfung der Kleinischen Strafrechtstheorie (Chemnitz, 1800), that was Feuerbach’s answer to the work written by Ernst Ferdinand Klein, *Grundsätze des gemeinen deutschen und preußischen peinlichen Rechts* (Halle, 1796); on Feuerbach, see the – classical works – written by Karl Binding, “Zum Hundertjährigen Geburtstag Anselm Feuerbachs”, *Strafrechtliche und Strafprozessuale Abhandlungen I* (1915), p. 507-521; Max Grünhut, “Anselm von Feuerbach und das Problem der strafrechtlichen Zurechnung”, *Hamburgische Schriften zur gesamten Strafrechtswissenschaft* (Hamburg, 1922); Herbert Blohm, *Feuerbach und das Reichsstrafgesetzbuch von 1871* (Breslau, 1935); Eberhard Kieper, *Johann Paul Anselm Ritter von Feuerbach, sein Leben als Denker, Gesetzgeber und Richter* (Darmstadt, 1969); Gustav Radbruch, *Paul Johann Anselm Feuerbach. Ein Juristenleben* (Göttingen, 1969); Mario A. Cattaneo, *Anselm Feuerbach, filosofo e giurista liberale* (Milano, 1970).

strongly than ever”.¹⁷⁶ From then onwards, many European criminal codes, some of them partly influenced by the criminal Codes of France (1810) and Bavaria (1813),¹⁷⁷ laid down the principle of legality.¹⁷⁸

Nonetheless, it is important to keep in mind that, even before that Feuerbach coined his famous expression *nulla poena sine lege, nulla poena sine crimine, nullum crimen sine poena legali* (“No no punishment without law, no punishment without crime, no crime without a criminal law”) in the Bavarian criminal Code (1813),¹⁷⁹ the principle of legality had been constitutionally recognized through the *Declaration of the Rights of Man and of the Citizen* (1789)¹⁸⁰ and the *French Constitution* of 1791.

¹⁷⁶ Ancel, “The Collection of European Penal Codes...”, p. 345; Hall, “Nulla Poena sine Lege”, p. 169-170.

¹⁷⁷ Ancel, “The Collection of European Penal Codes...”, p. 346 ff.

¹⁷⁸ See, among others, the following 19th-century codes: Code of *Grand-Duché d’Oldenburg* 1814 (*Das Strafgesetzbuch für die Herzoglich-Oldenburgischen Lande von 10. September 1814*, Oldenburg, 1814), Polish criminal Code of 1818, Code of the Two Sicilies of 1819, Parma criminal Code of 1820, Spanish Code of 1822, Russian Code of 1832 (coming into force in 1835), Greek criminal Code of 1834, *Das Strafgesetzbuch für das Königreich Sachsen vom 30. März 1838...* (Dresden, 1838), Sardinia criminal Code of 1839 (governing Piedmont and Sardinia), *Das Strafgesetzbuch für das Grossherzogthum Sachsen-Weimar-Eisenach vom 5. April 1839...* (Eisenach, 1840), *Das Strafgesetzbuch für das Königreich Württemberg vom 5. September 1839* (Stuttgart, 1839), *Allgemeines Criminal-Gesetzbuch für das Königreich Hannover vom 8. August 1840* (Hannover, 1851), *Criminalgesetzbuch für das Grossherzogthum Sachsen-Altenburg vom 3. Mai 1841...* (Darmstadt, 1841), *Strafgesetzbuchs für das Grossherzogthum Hessen vom 17. September 1841...* (Altenburg, 1841), Norwegian Code of 1842, Russian Code of 1845, *Strafgesetzbuch für das Großherzogthum Baden vom 6. März 1845...* (Karlsruhe, 1845), Polish criminal Code of 1847 (coming into force in 1848), *Das Straf-Gesetzbuch für die Frei Stadt Frankfurt und deren Gebiet in seinem Entwurfe vom Jahre 1848 nach dem am 1. Januar 1857 dahier in Kraft tretenden Straf-Gesetzbuch für das Großherzogthum Hessen* (Frankfurt am Main, 1856), Spanish Codes of 1848 and 1850, Prussian Code of 1851 (*Das Strafgesetzbuch für die Preussischen Staaten...vom 14 April 1851*, Berlin, 1851), Austrian Code of 1852 (*Das Strafgesetz über Verbrechen, Vergehen und Übertretungen, die Strafgerichts-Competenz-Verordnungen und die Preßordnung vom 27. Mai 1852 für das Raiserthum Österreich*, Wien, 1852), Portugal Code of 1852, Tuscan Code of 1853, Sardinia criminal Code of 1859 (governing Piedmont, Sardinia and Lombardia), *Criminalgesetzbuch für das Königreich Sachsen vom 11. August 1855...* (Leipzig, 1862), *Das Strafgesetzbuch für das Königreich Bayern vom 10. November 1861* (München, 1861), Swedish Code of 1864, Rumanian criminal Code of 1864, Danish Code of 1866, Belgian Penal Code of 1867, Spanish Code of 1870, *Das neue Strafgesetzbuch für den Norddeutschen Bund... vom 31. Mai 1870* (Berlin, 1870), German Code of 1871 (*Das Strafgesetzbuch für das Deutsche Reich*), Hungarian Code of 1878, Dutch Code of 1881; Portugal Code of 1886, Zanardelli Code of 1889; Finland Code of 1889, Bulgarian Code of 1896; see also the first 20th-century criminal code of Europe: the Norwegian Code of 1902.

¹⁷⁹ It seems to me, however, that the main merit of Feuerbach consisted in the legal recognition of the principle of legality within the political context of an absolutist state. While in France the principle of legality was recognized in the context of a political revolution to set up the Liberal system, in Bavaria the principle was legally – not constitutionally like in France – recognized with the absolutist system; on the Bavarian criminal code of 1813, see the classical works written by Ludwig von Jagermann, *Das neue Badische Strafgesetzbuch mit systematischen Übersichten, Competenzbezeichnungen, Parallelstellen, Register u.s.w., zur Erleichterung des Gebrauchs, besonders für Beamte und Geschworne* (Karlsruhe, 1851); Karl Scheickert, *Das badische Strafgedikt von 1803 und das Strafgesetzbuch von 1845. Ein Beitrag zur Geschichte der deutschen Partikularstrafgesetzgebung im 19. Jahrhundert* (Freiburg, 1903); see also Hall, “Nulla Poena sine Lege”, p. 169-170.

¹⁸⁰ Art. 8 Bavarian criminal Code: “No one can be punished except under prior law and

It would not be fully accurate to hold, either that the principle of legality was conceived in the 18th and 19th centuries, as if it had had no previous historical development,¹⁸¹ or that the dissemination of the legality principle was mainly due to the influence of the French code over other European jurisdictions. In the 19th-century Spain, for example, the criminal codes laid down the principle of legality after its prescription made by all the constitutions (1812, 1837, 1845, 1869, 1876),¹⁸² although the text of Cádiz did not contain an express recognition of the legality principle.¹⁸³ The same could be said concerning the German constitutionalism or that of other European countries.¹⁸⁴

legally applied to the crime”; see also Hall, “Nulla Poena sine Lege”, p. 169-170.

¹⁸¹ On the history of this principle, see Ballesteros Llompart, J.: “La Historia y la Historicidad del principio jurídico *nulla poena sine lege*”, *Estudios en honor al prof. José Corts Grau*. Valencia 1977, I, p. 521-537; Camargo Hernández, César: “El Principio de legalidad de los delitos y de las penas”, *Revista de la Facultad de Derecho de la Universidad de Madrid*, vol. III, n^o 5, 1959; Dedes, Christos: “Sobre el origen del principio “*nullum crimen nulla poena sine lege*””, *Revista de Derecho Penal y Criminología*, 2^a Época, n^o 9 (2002), p. 141-146; Guallart, J. / Goicoechea, L. de: “El principio “*Nullum crimen, nulla poena sine previa lege*” en los Fueros de Aragón,” *Homenaje a la memoria de Don Juan Moneva*. Zaragoza, 1954, p. 659-682; on the history of this principle in the Spanish historiography, Masferrer, Aniceto: “La historiografía penal española del siglo XX. Una aproximación a sus principales líneas temáticas y metodológicas”, *Rudimentos Legales* (2003), p. 5, footnote n. 199; in the German historiography, see Schottländer: “Die geschichtliche Entwicklung des Satzes: *Nulla poena sine lege*,” *Strafrechtliche Abhandlungen*, Breslau, 1911; Krey, Volker: *Keine Strafe ohne Gesetz. Eine Einführung in die Dogmengeschichte des Satzes “nullum crimen, nulla poena sine lege”*. Berlin-New York, 1983; Sprandel, Rolf: “Ivo von Chartres und die moderne Doktrin “*nulla poena sine lege*””, *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte*. Kanonistische Abteilung 47 (1961) p. 95-108; in the Anglo-American historiography, see Hall, “Nulla Poena sine Lege”, p. 165-193; Pomorski, Stanislaw: *American Common Law and the Principle Nullum Crimen sine Lege* (Elzbieta Chodakowska trans., 2nd ed., 1975); Mokhtar, Aly: “Nullum Crimen, Nulla Poena Sine Lege: Aspects and Prospects,” (2005) *Statute Law Review* 26: 41.

¹⁸² Only the Constitution of 1812 did not expressly mention this principle, although it can be deduced from the interpretation of certain precepts: Article 9, Constitution 1837; Article 9, Constitution 1845; Article 10, Constitution *nonnata* (1856); Article 11, Constitution 1869; Article 16, Constitution 1876; see also Article 28, Constitution 1931; Articles 3 and 25(1), Constitution of 1978.

¹⁸³ On the evolution of this principle in Spanish constitutionalism, see Ruíz Robledo, Agustín: “El principio de legalidad penal en la historia constitucional española”, *Revista de Derecho Político*, XLII (1997), p. 137-169; see also Mirow, “The Legality Principle and the Constitution of Cádiz”, cited in the footnote n. 34; Mirow, Matthew C.: “Codification and the Constitution of Cádiz”, *Estudios Jurídicos en Homenaje al Professor Alejandro Guzmán Brito* (Patricio-Ignacio Carvajal / Massimo Miglietta, eds.), Edizioni dell’Orso, 2012 (forthcoming, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1844438).

¹⁸⁴ In Germany, for example, Art. 103. 2 of the current German constitution is a clear provision in line with German constitutional history itself, considering some of their constitutions, namely, that of Hessen (17.XII.1820, §105); the *Constitution of the Prussian state* (5.XII.1848, §§7-8) within both the *oktrojierte Verfassung* (1848-1850) and *reidierte Verfassung*, respectively; and the Weimar Constitution (11.VII.1919, art. 116); among others; see the *Dokumente zur Deutschen Verfassungsgeschichte* (Herausgegeben von Ernst Rudolf Huber), 1961. I use the 3rd edition of W. Kohlhammer Verlag, Stuttgart-Berlin-Köln-Mainz, Band 1: *Deutsche Verfassungsdokumente 1803-1850* (1978); Band 2: *Deutsche Verfassungsdokumente 1851-1900* (1986); Band 4: *Deutsche Verfassungsdokumente 1919-1933* (1991); see also Fritz Hartung, *Deutsche Verfassungsgeschichte vom 15. Jahrhundert bis zur Gegenwart* (Stuttgart: Koehler, 9th ed., 1969), p. 310-342; on this matter, see Masferrer, “The Principle of Legality and Codification in the 19th-century Western Criminal Law Reform”, cited in the footnote n. 39.

Another group of criminal law institutions whose study may result particularly revealing concerning the influence of the French codes over the codification of criminal law in Spain is that of punishments. A historical analysis of the French tradition reveals that the punitive system of the codification was relatively similar to that in force in France in the 18th century. Muyart de Vouglans, a famous French lawyer,¹⁸⁵ mentioned, in describing the variety of punishments, the capital punishment,¹⁸⁶ corporeal punishments,¹⁸⁷ afflictive punishments,¹⁸⁸ infamous punishments,¹⁸⁹ and the pecuniary ones.¹⁹⁰

Bérenger distinguished between capital punishments (death penalty,¹⁹¹ galleys, perpetual exile or banishment), afflictive punishments (any kind of corporeal punishment), and infamous punishments (*l'amende*, temporary exile, *le blâme*, and the criminal *amende*).¹⁹² In addition to it, he showed that the distinction between principal penalties and accessory penalties existed at least from the Criminal Ordinances of 1670 promulgated by Louis XVI.¹⁹³

It may be that some punishments regulated in the French criminal code later on were partly adopted by other European codes. Yet, this needs to be carefully analyzed. For Spain it is also true – like in France – that many punishments introduced in the codes had their origin in their own criminal-law tradition.¹⁹⁴ The question is to what extent these punishments were influenced by the *Code pénal*. Let me conclude by giving some examples which cannot be properly neither explained nor developed here.

The punishment of infamy regulated in the 1822 Spanish criminal code was not

¹⁸⁵ Muyart De Vouglans, Pierre-Francois: *Les lois criminelles de France, dans leur ordre naturel*. Paris, 1780, p. 53-88; una panorámica sobre el Derecho penal francés del siglo XVIII puede verse en otra obra de este mismo autor, a saber: *Institutes au droit criminel, ou principes généraux sur ces matieres, suivant le droit civil, canonique, et la jurisprudence du Royaume; avec un traité particulier des crimes*. Paris, 1768.

¹⁸⁶ Muyart De Vouglans, *Les lois criminelles de France...cit.*, p. 53-59.

¹⁸⁷ Muyart De Vouglans, *Les lois criminelles de France...cit.*, p. 59-67.

¹⁸⁸ Muyart De Vouglans, *Les lois criminelles de France...cit.*, p. 68-73.

¹⁸⁹ Muyart De Vouglans, *Les lois criminelles de France...cit.*, p. 74-81; among the infamous punishments, he distinguished the *infamia iuris* from the *infamia facti*. He regarded as *infamia iuris* the civil death, *la condamnation de la memoire*, the *blâme*, the nobility's degradation, and the perpetual interdiction or the disqualification – privation – from holding an office (Muyart De Vouglans, *Les lois criminelles de France...cit.*, p. 75-77). He considered as *infamia facti* the punishment of admonition, *l'abstention des lieux*, and the temporary interdiction (Muyart De Vouglans, *Les lois criminelles de France...cit.*, p. 80-81).

¹⁹⁰ Muyart De Vouglans, *Les lois criminelles de France...cit.*, p. 81-88.

¹⁹¹ The civil death was regulated in France for the first time with this expression (“morte civil”) in the Criminal Ordinances of 1670 (on this matter, see Renaud, Achille: *La mort civile en France. Par suite de condamnations judiciaires, son origine et développement*. Paris, 1843, p. 10)

¹⁹² Bérenger, Alphonse-Marie-Marcellin-Thomas: *De la répression pénale, de ses formes et de ses effets*. Paris, 1855, p. 410-411.

¹⁹³ Bérenger, *De la répression pénale...cit.*, p. 412; see also Jousse, Daniel: *Nouveau commentaire sur l'Ordonnance criminelle du mois d'Autout 1670*. Paris, 1763.

¹⁹⁴ For a general view on that matter, see Masferrer, *Tradición y reformismo en la Codificación penal española...*, p. 159 ff.; Masferrer, “Codification of Spanish Criminal Law in the Nineteenth Century...”, p. 132-136.

much influenced by the French model,¹⁹⁵ and was abolished in 1848,¹⁹⁶ whereas in France it remained in force until 1994.¹⁹⁷ The disqualification from holding public office as a consequence of a criminal conviction reflects some degree of influence from the Napoleonic code,¹⁹⁸ but much less than that from other European jurisdictions, Germany among them.¹⁹⁹ The same can be said concerning the civil interdiction. Whereas in Spain this punishment affected only the private-law sphere,²⁰⁰ in other European countries (Prussia, Portugal, Italy and Belgium, among others) its legal consequences affected – because of the French model’s influence – both the private law and public law provinces.²⁰¹

Summing up what has been shown, it may be said that the influence of the French code over the codification of criminal law in Spain is undeniable, but to a less extent than one may expect, particularly regarding specific criminal law institutions, whose regulation in the first criminal codes (1822 and 1848) reveals both the attachment to the Spanish legal tradition and the influence of other foreign codes, not all of them European (as it proves the 1830 Brazilian code’s impact on the 1848 Spanish criminal code).²⁰² Yet, this matter deserves, as I said, a much further and more exhaustive analysis which may confirm or qualify this first approach in the Spanish historiography.

This work has been undertaken in the context of the research project entitled “La influencia de la Codificación francesa en la tradición penal española: su concreto alcance en la Parte General de los Códigos decimonónicos” (ref. DER2012-38469), financed by the Spanish ‘Ministerio de Economía y Competitividad’.

¹⁹⁵ On the punishment of infamy in the Spanish criminal law tradition, see Masferrer, *La pena de infamia en el Derecho histórico español...*, cited in the footnote n.36; Masferrer, “La pena de infamia en la Codificación penal española”, cited in the footnote n. 36.

¹⁹⁶ Art. 23 1848 SCC: “La ley no reconoce pena infamante alguna” [“Law does not recognize any penalti of infamy”]; on the abolition of this punishment in Spain, see Masferrer, *La pena de infamia en el Derecho histórico español...*, p. 385-389; Masferrer, “La pena de infamia en la Codificación penal española”, p. 170-175; Masferrer, “Codification of Spanish Criminal Law in the Nineteenth Century...”, p. 131-132.

¹⁹⁷ On the punishment of infamy in the French criminal-law tradition, see Beignier, Bernard: *L’honneur et le droit*. Paris, 1995; see also De Lacretelle, Pierre Louis: *Discours sur le préjugé des peines infamantes*. Paris, 1784.

¹⁹⁸ Masferrer, Aniceto: *La inhabilitación y suspensión del ejercicio de la función pública en la tradición penal europea y anglosajona. Especial consideración a los Derechos francés, alemán, español, inglés y norteamericano*. Madrid, Servicio de Publicaciones del Ministerio del Interior, 2009, p. 185-316.

¹⁹⁹ For the development of this punishment in Germany, see Masferrer, *La inhabilitación y suspensión del ejercicio de la función pública en la tradición penal europea y anglosajona*, p. 101-183.

²⁰⁰ Manzanares Samaniego, José Luis: “La pena de interdicción civil”, *Anuario del Derecho Penal y de las Ciencias Penales*, 1979, II p. 345-380; González Rus, Juan José: “La supresión de la pena de interdicción civil”, *La Ley. Revista jurídica española de doctrina, jurisprudencia y bibliografía* 4 (1984), p. 1088-1094; Morales Prats, Fermín: “Fundamento político-criminal de la supresión de la pena de interdicción civil”, *Revista Jurídica de Catalunya* 85, I (1986), p. 155-180.

²⁰¹ Groizard y Gómez de la Serna, *El Código penal de 1870 concordado y comentado*, vol. II, p. 236-237; see also Masferrer, *La inhabilitación y suspensión del ejercicio de la función pública en la tradición penal europea y anglosajona*, p. 254-255.

²⁰² See the footnote n. 102 and its main text.